IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1550

CLEMENTE JAVIER AQUIRRE-JARQUIN

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

BILL McCOLLUM
ATTORNEY GENERAL

BARBARA C. DAVIS
Fla. Bar No. 410519
ASSISTANT ATTORNEY GENERAL
444 SEABREEZE BLVD., SUITE 500
DAYTONA BEACH, FLORIDA 32114
(386)238-4990
FAX - (386) 226-0457

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE

On June 17, 2004, Aquirre was arrested on charges of Tampering with Evidence in connection with the murders of Cheryl Williams and Carol Bareis. (V1, R1-2). On June 25, 2004, he was charged with their murders. (V1, R11-12). He was indicted on the murder charges on July 13, 2004. (V1, R20-21). The State also filed an Information on the charge of burglary of a dwelling with assault or battery. (1stSR881).[1] The burglary charge was consolidated with the two murder charges on December 1, 2005. (V1, R200; 1stSR882, 883).

The Public Defender filed multiple pre-trial motions regarding the death penalty. (V1, R47-131). The motions were denied at different points in the proceedings. (V1, R180-181, 200). The trial judge granted the motion for the State to disclose the aggravating circumstances sought. (V2, R2101-202, 211). The Public Defender also filed several requests for *Nelson*[2] hearings at different times pre-trial. (V1, R136, 171, 195). After hearings on the motions, Aquirre advised the trial judge he wanted to keep his current attorneys. (V1, R137, 173, 195). Aquirre filed a motion to exclude statements made June 17 and 18, 2004. (V2, R204-206). This motion was not the ordinary motion to suppress, but was an

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[1] Cites to the record are by volume number, "V" followed by "R" and the page number. "1stSR" indicates First Supplemental Record. "2ndSR" indicates Second Supplemental Record.

[2] *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973).

objection to law enforcement officers translating the statements from Spanish and an objection to using any transcript translated by law enforcement. The motion was denied. (V2, R221).

The State filed a Notice of Intent to Use Similar Fact Evidence; i.e., that Aquirre entered the victims' home without permission on several occasions prior to the murders. (V2, R216).

The case was tried by jury from February 20 to February 28, 2006. (V6-13, R1-1597). Aquirre was found guilty on both counts of first-degree murder and one count of burglary with an assault or battery. (V2, R288-290).

The penalty phase took place March 9-10, 2006. (V14-16, R1-412). The jury recommended the death sentence for the murder of Cheryl Williams by a vote of seven to five (7-5). (V2, R318). The jury recommended the death sentence for the murder of Carol Bareis by a vote of nine to three (9-3). (V2, R319).

The *Spencer*[3] hearing was held June 1, 2006. (V18, R775-873). Judge Eaton sentenced Aquirre to two sentences of death on June 30, 2006. (V3, R409-432; V18, R874-880). The trial court's comprehensive sentencing order set out the following aggravating circumstances:

Murder of Cheryl Williams

Aggravating circumstances

[3] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

(1) Prior violent felony: contemporaneous murder of Carol Bareis – moderate weight;

(2) Committed during burglary – more than moderate but less that great weight;

(3) Heinous, atrocious and cruel – great weight.

(V3, R417-420).

Murder of Carol Bareis

Aggravating circumstances

(1) Prior violent felony: contemporaneous murder of Cheryl Williams - great weight;

(2) Committed during burglary – more than moderate but less that great weight;

(3) Committed to avoid arrest – great weight;

(4) Heinous, atrocious and cruel – great weight;

(5) Victim was particularly vulnerable – great weight.

(V3, R420-424).

The trial court's comprehensive order gave weight to the following mitigating circumstances as to each individual murder:

(1) Under the influence of extreme emotional disturbance – moderate weight;

(2) Substantially impaired ability to appreciate criminality – moderate weight;

(3) Age (24) – little weight;

(4) Long-term substance abuse – moderate weight;

(5)(6) Dysfunctional family/physically abused as a child – little weight;

(7) Poor performance in school – little weight;

(8) Brain damage from polysubstance abuse – moderate weight.

(V3, R424-429).

***Nelson* Hearings**

At the February 11, 2005, *Nelson*[4] hearing, Aguirre stated he was promised discovery in Spanish and had not received any documents. (V16, R439). Defense counsel said his office had received over 1000 documents. He had deposed several witnesses and was trying to locate others that had relocated. (V16, R440-42). He received a crime scene video which he planned on bringing to the jail to show Aguirre. (V16, R443). Trial Counsel provided their expert, Dr. Day, with a large volume of material. (V16, R443). Counsel was in the process of reviewing an audio CD of the 911 call and an audio-taped interview of Aguirre with investigators. (V16, R444). Counsel was in the process of having the taped interview translated into Spanish. (V16, R444). Counsel was informed the initial translation of the interview was incorrect and was seeking another translation. (V16, R445-46). At Aguirre's insistence, Counsel provided Aguirre with the incorrectly-transcribed interview. (V16, R446). Counsel was very careful when

[4] *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973).

discussing evidence with his client. (V16, R448). Counsel warned Aguirre of the dangers of having discovery material in the jail. (V16, R449). Counsel continued to prepare Aguirre for the possibility that the State might seek the death penalty. (V16, R450). The court explained the capital litigation process to Aguirre, and found counsel was adequately representing him. (V16, R451-53). Aguirre chose to have current counsel continue to represent him. (V16, R453-54).

At the June 10, 2005, *Nelson* hearing, Aguirre said he had not received requested information from his counsel and phone calls were not returned. (V16, R462). When counsel met with Aguirre on March 24, counsel informed Aguirre that the State had not provided DNA results. In addition, certain requested documents had not been transcribed into Spanish. Aguirre had been provided a Spanish version of his interview with police. (V16, R463). Counsel continued to conduct pre-trial discovery. (V16, R464). Counsel did not want to conduct depositions of the FDLE DNA analysts until testing was completed. (V16, R465). The case had been delayed due to the completion of DNA testing. (V16, R467). Counsel was still attempting to locate several potential witnesses who had relocated. (V16, R469). Several depositions had to re-scheduled. (V16, R470). Counsel need the benefit of an interpreter to discuss Aguirre's case with him as Aguirre's English was poor. (V16, R471). An expert had examined Aguirre several times to prepare for mitigation. (V16, R474).

Aguirre was dissatisfied with the lack of discovery provided to him. (V16, R477-78). The court explained that capital cases take a long time to come to trial, in particular, due to forensic analysis. (V16, R478). Counsel had shown Aguirre the crime scene video and photographs. (V16, R480). A disk containing Aguirre's statements to law enforcement was unusable although counsel could play it on his desktop at his office. (V16, R479-481; 482). The court suggested the CD be played in the courtroom. (V16, R483-84; 487-88). The court explained that translating all discovery into Spanish would be "counter-productive" and "cost-prohibitive." (V16, R484; 488). The court found counsel was adequately representing Aguirre. (V16, R485). Aguirre chose to have counsel continue to represent him. (V16, R487).

At the November 8, 2005, *Nelson* hearing, counsel informed the court that Aguirre sought to file a demand for speedy trial. (V16, R547). Counsel discussed the matter with Aguirre and the public defender, James Russo. Counsel did not believe it was in Aguirre's best interest. (V16, R548). As the State was seeking the death penalty, Counsel was not yet fully prepared for mitigation. (V16, R549). Counsel believed he would be fully prepared in three months' time. (V16, R552). Counsel continued to prepare for trial. (V16, R553-556). The court informed Aguirre that counsel needed to be prepared for trial due to the serious nature of the crimes, and found that counsel was reasonably progressing with the case. (V16,

R560). Aguirre stated that his counsel "told me we're gonna lose" and he wanted to fire him. (V16, R561; 568). The court again informed Aguirre that he was represented by competent counsel. (V16, R562). The court informed Aguirre that counsel was responsible for telling him his chances of success. (V16, R565). Counsel discussed all aspects of the case with his client. (V16, R568-580). The court again informed Aguirre he was adequately being represented and denied the request for appointment of new counsel. (V16, R580). The court explained all aspects of trial procedure to Aguirre. (V16, R582-588). Aguirre chose not to represent himself. (V16, R588).

Motion for New Trial Hearing

During the pendency of Aguirre's direct appeal, the State notified trial and appellate counsel that the palm print analysis conducted by Donna Birks, Seminole County Sheriff's Office, may not be accurate. Aguirre's appellate counsel filed an Unopposed Motion to Relinquish Jurisdiction for an Evidentiary Hearing. On August 20, 2007, this Court relinquished jurisdiction to the trial court to hold an evidentiary hearing. Trial counsel filed a Motion for New Trial on Grounds of Newly Discovered Evidence. (2nd SR 887-889). Judge Eaton held a hearing on September 25, 2007. (2nd SR 953-1042). Christina Barber, FDLE latent print analyst, and Jennie Ahern, Seminole County Sheriff's Office, testified at the hearing.

Ms. Barber has conducted thousands of latent print examinations. (2ndSR, R969, 971). On May 3, 2007, Barber conducted a comparison of latent prints with Aguirre's known standard. (2ndSR973, 976). She examined Aguirre's fingerprint and palm print standards, photographs, and a certified copy of Aguirre's left-hand palm print.[5] (2ndSR977). She did not review Donna Birks' testimony from the trial. (2ndSR976). She conducted an independent examination and made her own findings. (2ndSR978). Barber concluded "there was not sufficient detail in that print to either eliminate or identify anyone." (2ndSR980; 982; 983). Her conclusions were verified by several other FDLE personnel. (2ndSR985). FDLE guidelines state if a latent print has seven characteristics, it could be of potential value. (2ndSR980). Barber re-examined several cases that involved Donna Birks as the analyst. She came to different conclusions than Birks. (2ndSR986; 987). In cases where other analysts re-examined Birks' conclusions, at least five did not have sufficient information to make an identification. (2ndSR987). In at least one case, Birks' identified the wrong person. (2ndSR988).

There are three conclusions that can be made in latent print identification: 1) an identification; 2) a non-identification; and 3) inconclusive. In this case, the latent print itself was insufficient. (2ndSR989). Barber did not know if the print was

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[5] Barber generated a report on May 4, 2007. (2ndSR2974). A private lab conducted an addition examination. (2ndSR974-75).

lifted from the knife. She used photographs of the latent print to make her conclusions. (2ndSR989-90).

Barber noted that Birks found what appeared to be seven points of comparison. Barber agreed with only three of the comparison points found by Birks. (2ndSR991). In Barber's opinion, the print on the knife did not point to Aguirre or exclude him. (2ndSR991-92). The print was of no value. No one could be identified or excluded. (2ndSR992).

Ms. Ahern has been working in latent print examinations for over 30 years. (2ndSR, R995-96). As a verification process, she reviewed Barber's conclusions in this case. (2ndSR997). She looked at the photographs that were submitted by Donna Birks, which had eight markings indicating points of comparison. (2ndSR998). Ahern independently examined unmarked photographs of latent prints. She compared the photographs with the known palm print standards of Aguirre. She determined there were not enough characteristics to make a comparison. Ahern reached the same conclusions as Barber. There were insufficient ridge characteristics to either identify or eliminate any individual as making the print in the photographs. (2ndSR999). Ahern was able to "orient" five of the eight comparison points identified by Birks. Since there were some discrepancies, she was not able to identify or eliminate anyone. (2ndSR1000; 1001). The print

appeared to have been left in a liquid substance, “possibly blood,” so that “the orientation was not completely where it should have been.” (2nd SR1001).

STATEMENT OF THE FACTS

Cheryl Williams and Carol Bareis, a 69-year old stroke victim, were found murdered in their residence on June 17, 2004. (V9, R728, 733). Bareis was paralyzed on her left side and confined to a wheelchair. (V9, R751, 776). Neighbor Diane Shroyer last saw Williams the previous night at approximately 10:30 p.m. (V9, R751,755-76). Williams’ daughter, Samantha, and Samantha’s boyfriend, Mark Van Sandt, had been at the residence the night before, and left at 11:30 p.m to spend the night at Van Sandt’s house. (V9, R728, 730, 769-770). Mark returned the next morning to retrieve clothes for Samantha and found Williams’ body lying by the front door. (V9, 732-35). He called 911 and was advised to try to resuscitate Williams. Van Sandt was barefoot and realized he “was stepping in her blood.” (V9, R735).[6] When he touched Wiliams, “she was already cold.” (V9, V734). When police arrived, they found the body of Carol Bareis on the floor in front of her wheelchair. (V9, R735, 748-49).

Aquirre (a.k.a. “Shorty”) lived next door to the Williams’ residence at 121 Vagabond Way. (V9, R771-72). On occasion, Aquirre had been invited into Williams’ home. (V9, R771, 772). However, a few months before the murders, he

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[6] Van Sandt was photographed and fingerprinted, and his feet swabbed. (V11, R1010).

came into Samantha's bedroom uninvited. (V9, R774). Williams told him to get out of her house and locked the door behind him.[7] (V9, R774-75). The next day, Williams told him not to enter her home uninvited. (V9, R775). Although Aquirre spoke Spanish, Williams could converse with him and he understood her. (V9, R775-76). She did not report this incident to the police because she knew Aquirre was an illegal immigrant. (V9, R789).

Investigators obtained consent to search the neighbor's property where Aguirre lived,[8] and found a bloody knife on the ground near the fence dividing the neighbor's property and the murder scene. (V9, R796; V10, R807 ; State Exhibit 7). Feliciano Sequeida, his cousin Guillermo Espinosa, and Aquirre all worked in the kitchen at the same restaurant. (V10, 842-43). When shown photographs of the knife that had been collected at the crime scene (V10, R810, State Exhs. 8 and 9), Sequeida said the knife was the "type we have at the house." (V10, R838).

John Andrich, head chef at Luigino's restaurant, was Aquirre's supervisor. (V10, R914-15). He used two types of knife sets at work, Mandau knives with black handles, and Sysco knives, with white handles. (V10, R914; 917). When Andrich was interviewed by Investigator Jeffrey Bean after the murders, Andrich noticed that one of the 10-inch Sysco knives was missing from the set at the

[7] The doors to the home were typically unlocked. (V9, R782, 788).

[8] Neighbor Feliciano Sequeida allowed Aquirre to live in a shed on his property. (V10, R837; 841).

restaurant. (V10, R918; 920; 936; 945). Andrich showed Inv. Bean the Mandau knives and Sysco Knives. (V10, R948). State Exhibit 7, the knife found between the murder scene and Aquirre's shed, was a 10-inch chef's knife. (V10, R922). It was the same type of knife that was missing from the restaurant's knife set. (V10, R923). All of the kitchen employees had access to the knives, but only chefs with permission were allowed to borrow the knives. (V10, R922, 939-940). Aquirre's responsibilities included washing the knives. (V10, R922).[9]

On June 18, a search warrant was obtained for Aquirre's residence, a shed located behind a trailer at 117 Vagabond Way, next door to the murder scene at 121 Vagabond Way. (V10, R870-71). The focus of the search was a white plastic bag that "contained bloody clothing on the roof of that shed." (V10, R871). The bag was processed and brought to the forensic laboratory. It was placed in a "drying room." (V10, R873). After the clothing dried, it was photographed, packaged, and sent to FDLE. (V10, R874). The clothing included two white Nike socks, a black T-shirt, and Nike orange and blue swim shorts. (V10, R874-77,

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[9] Donna Birks, Seminole County Sheriff's Office latent print examiner took fingerprint and palm prints from Aquirre. (V10, R960-61; 964). In comparing a photograph of a print found on the knife to the known prints of Aquirre, Birks opined the print on the knife was Aquirre's left palm print. (V10, R967-69). Birks could not determine how the knife was held. (V1, R970). Birks' testimony was later discredited, and this print identification was the subject of this Court's relinquishment proceedings, the Motion for New Trial, and the hearing on the Motion for New Trial.

State Exhs. 23-31). Suspected bloodstains were visible on the socks and swim trunks. (V10, R877-78). The black Hilfiger T-shirt did not show stains, but there was a visible substance on the shirt. (V10, R878). Nothing of evidentiary value was recovered form the interior of the shed, but a search of the trailer at 117 Vagabond yielded a pair of bloodstained underwear. (V10, R879, State Exhibit 126). The blue Fruit of the Loom boxer briefs were in the bathroom on the floor. (V10, R879).

Multiple footwear impressions were documented at the crime scene. (V11, R1015; 1019, 1020; 1021; 1022; 1023; 1024). The impressions indicated someone stepped in a pool of blood near Cheryl Williams' body and travelled throughout the residence. (V11, R1028-29). The shoes Aquirre was wearing on June 17, size 7½ black Reebok athletic shoes, were collected. (V11, R1029-31, Exhibits 51 and 52). The shoes were processed and test impressions were prepared for comparison purposes. (V11, R1031; 1034). Of the 67 footwear impressions located throughout the interior of the victims' home, 64 were of value of comparison. (V11, R1091092). Of those 64 impressions, all 64 could have been made by Aquirre's shoes.[10] (V11, R1092). Of the numerous footwear impressions observed on the

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[10] Nineteen footwear impressions were located in the foyer; five were located on the stairs; two were located in the living room; twenty-five were located in the kitchen; three on a mirror; and nine in the hallway near the south bedroom.(V11, R1045-46; 1048; 1055; 1058; 1063-64; 1075; 1079-80).

exterior of the home,[11] at least 4 impressions could have been made by Aquirre-Jarquin. (V11, R1080; 1092; 1099).

DNA from known standards of Aquirre and the two victims were compared with various pieces of evidence. (V11, R1149; 1151; 1152; 1157).[12] Cheryl Williams' blood was on Aguirre's socks, shoes, black T-shirt, and the knife handle. (V11, R1159-62). Carol Bareis was a contributor to a bloodstain on Aquirre's black T-shirt. (V11, R1162). Bloodstains on Aquirre's blue and orange shorts revealed both Williams' and Bareis' DNA. (V11, R1164). DNA from the waistband of the boxer shorts matched Aquirre. (V12, R1222). Williams' blood was on the boxer shorts. (V11, R1164). Bareis' blood and Aquirre's DNA were also included as contributors to stains on the briefs. (V11, R1165; 1195). The knife blade contained both Williams' and Bareis' blood. (V11, R1165-67).[13]

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[11] Two bloody footwear impressions were located on the front porch. (V11, R1081). At least twenty-six impressions were located in sand nearby. Four impressions could have been made by Aquirre-Jarquin; other footwear impressions belonged to law enforcement or were eliminated as being made by Aquirre or law enforcement. (V11, R1080; 1091).

[12] The evidence included: swab from knife blade, knife handle and a print from the knife-State Exhs. 121, 122, 127; Nike Socks-Exhs. 123 and 128; black t-shirt-State Exhibit 124, orange shorts-State Exhibit 125, and boxer briefs-State Exhibit 126. (V11, R1152-53; 1157). There was no semen found in either Williams' or Bareis' sexual assault kit. (V11, R1184-85). Fingernail scrapings from both victims were taken during the autopsies. (V13, R1403).

[13] Dr. Martin Tracey calculated the DNA population frequency rates for Aquirre and the victims. (V12, R1243). The odds of another person unrelated to Cheryl Williams having that same DNA profile was "one person in a hundred and thirty

Norman Henderson, FDLE bloodstain pattern analyst, responded to the crime scene on June 17, at which time he made observations and took photographs. (V12, R1266-67). He returned to the crime scene on June 21 after physical evidence had been collected and they could conduct a more thorough examination. (V12, R1267). The significant amount of blood on the walls and bloodstain patterns on the walls indicated that a struggle had taken place in that area. (V12, R1268). There were several areas of cast-off bloodstain, some impact spatter, and a large amount of pooled or dropped blood. (V12, R1268). There was a large smear or swipe on the back of the door, likely from a hand. (V12, R1272-73). On the south wall of the front door, there were numerous bloodstains. Some were dropped blood, some were impact spatter, and others were contact stains. (V12, R1273). There was a cast-off bloodstain pattern in an arcing-type motion, on the north wall of the foyer. (V12, R1274-75). A significant amount of blood surrounded Carol Bareis' body in the living room, along with a cast off pattern on the door. (V12,

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quadrillion ... that's a hundred and thirty followed by fifteen zeros." (V12, R1247; 1248). The DNA profile on the T-shirt collar had the same genetic profile as Aguirre-Jarquin. There would be a "one in a hundred and ten million" chance that another individual would have the same characteristics. (V12, R1250-51). The DNA profile on the waistband of the orange shorts had the same genetic profile as Aguirre-Jarquin, with a "one in seven hundred and eighty-six trillion" chance that another individual would have the same characteristics. (V12, R1252-53; 1262). The swab from the middle of the knife contained Carol Bareis' DNA, with a "one in a hundred and fifty trillion" chance that it belonged to another individual. (V12, R1253).

R1275-76). The blood on the door was 22 ¾ inches above the floor. (V12, R1277). There was blood on clothing lying near the door, a continuation from the cast-off pattern on the door. (V12, R1278). The blood wrapped completely around all sides of the living room door. (V12, R, 1280). There was a finger swipe pattern of blood on Williams' right buttocks, consistent with her being grabbed. (V12, R1281-82; 1310).

Mr. Henderson also examined Aquirre's two white Nike socks, black T-shirt, and orange shorts contained contact bloodstains. (V12, R1285; 1303; 1306). Henderson sprayed the T-shirt with Luminol, which showed luminescence on the front and back of the shirt. (V12, R1283). Aguirre's orange and blue shorts had a "significant amount of blood" on both the front and back. There were pooling bloodstains, some contact stains, and some circular stains. (V12, R1284). There were some stains on the shorts that were circular and could have been either cast off or impact. The majority of those stains were "actually on the back side of the shorts." (V12, R1311). The stains on the back of the shorts were not contact stains. (V12, R1312). Aguirre's socks indicated some contact bloodstains and what is referred to as "drop blood," or blood that is "free falling." (V12, R1286).

Dr. Thomas Beaver, medical examiner, performed the autopsies on both Carol Bareis and Cheryl Williams. (V12, R1317; 1322; 1337). Carol Bareis exhibited two sharp force injuries, one on her back and one to her chest. She had

lacerations and contusions on the right side of her face and forehead. (V12, R1329-30). The stab wound to her chest, went "through her heart," cutting completely through the left ventricle. (V12, R1333; 1334; 1389). The V-shaped wound indicated a single-edged weapon was used. (V12, R1331; 1333). The stab wound to her back exhibited a yellow waxy color, indicative of a postmortem injury. (V12, R1332). Dr. Beaver concluded Bareis was sitting in her wheelchair[14] when she was stabbed through the heart. After she slumped over, she was stabbed in the back, fell to the floor, and subsequently sustained the abrasions to her face. (V12, R1335-36). She would have become unconscious almost immediately or within twenty seconds after being stabbed. (V12, R1389; 1392). The cause of death was a stab wound to the chest. (V12, R1337).

Cheryl's Williams' had 129 sharp force injuries consisting of stab wounds and incised wounds. (V12, R1342; 1345). Dr. Beaver could not say which wounds were inflicted first. (V12, R1380). Some of the wounds were "a little stick" made by the tip of the knife as Williams was moving about, attempting to ward off the blows. (V12, R1346-47). A stab wound to the femoral artery and vein produced a lot of bleeding. (V12, R1351). The wounds on Williams' legs indicated she was

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[14] Bareis had previously suffered a stroke and was paralyzed on her left side. (V9, R728; 776; 1336-37). The stroke is probably what left Bareis "wheelchair bound." (V12, R1336). An internal exam revealed arthrosclerotic cardiovascular disease. (V12, R1336).

kicking her feet in a defensive motion while being stabbed. (V12, R1353; 1364). A stab wound to Williams' back penetrated her left lung, a lethal wound. (V12, R1358; 1373). An additional stab wound penetrated her chest cavity, causing a severe wound. (V12, R1359). She had numerous defensive wounds on her hands and lower extremities. (V12, 1361-63). A vigorous struggle had taken place, "probably more violent than anyone in this room has seen before. It would be extremely violent." (V12, 1365). The stab wounds on her back, together with her askew clothing, indicated Williams was attempting to crawl away from her attacker. (V12, R1365; 1399). The cause of death for Williams was multiple stab wounds to the chest. (V12, R1367). After the stab wounds to her chest and the lung, Dr. Beaver opined it was "maybe a minute or two" before Williams became unconscious. (V12, R1383).

All the injuries sustained by Bareis and Williams were consistent with a knife. (V12, R1363). The knife in evidence, State Exhibit 7, was consistent with the weapon that caused the injuries to Bareis and Williams. (V12, R1375).

In Dr. Beaver's opinion, Williams was killed first. (V12, R1366). If the blade of the knife tested positive for Bareis' DNA and blood on the handle matched the Williams' DNA, it would show that Williams was killed first because the "blood of the last person would be in a greater quantity on the knife." When the knife goes in and come out, blood will be wiped from the blade onto the

tissues. So, "whoever's blood was on there first is gonna have a tendency to be wiped off and replaced by the second person's blood." (V12, R1367).

Aquirre testified on his own behalf. (V13, R1417). He was born in Honduras in 1980 and swam into the United States as an illegal alien, crossing from Mexico to Texas in March 2003. (V13, R1419). In June 2004, he was living at 117 Vagabond Way with Guillermo Espinosa and Feliciano Sequeida. (V13, R1420). He was working three jobs at that time: cutting grass with his brother-in-law, custodial work, and a cook/dishwasher at Luigino's restaurant. (V13, R1420-21). His roommates, Guillermo and Feliciano, worked with him at Luigino's. (V13, R1421). He knew Cheryl and Samantha Williams "very well." He had seen Bareis but never talked to her. (V13, R1422). At 6:00 a.m. on the morning of June 17, 2004, Aquirre attempted to enter the Williams' home through the partially-opened front door. (V13, R1422). He had arrived home at 5:00 a.m., after drinking all night. He wanted a beer and could not get any at the store until 7:00 a.m. (V13, R1431). He pushed on the door which was blocked by Cheryl Williams' body, "with blood everywhere." (V13, R1423). After he got through the door, he touched Williams' neck but he "couldn't touch her right" as she was face down. He lifted her and put his hand on her neck. (V13, R1424). He asked her "to wake up around three times." (V13, R1423). He put her over his legs as he told her to wake up. (V13, R1425; 1445).

Aquirre was nervous because there was blood everywhere. (V13, R1424). He noticed things in the house were in disarray. He saw a knife sitting on a box which looked similar to one he had seen at his house. He identified State Exhibit 7 as the knife he saw. (V13, R1426). He entered the living room and saw Bareis lying near her wheelchair. (V13, R1427-28). He touched her, but she was not breathing. (V13, R1428). He returned to Williams, picked up the knife, and screamed, "Is anybody here?" When nobody answered, he went into Samantha's room and saw items thrown around. He left the house, tossed the knife, and returned home. (V13, R1429). He did not see where the knife landed. (V13, R1430). He did not call police as he is an illegal alien and was fearful of deportation. (V13, R1429). He stripped off his bloody clothes, placed them in a plastic bag, and put them on the top of the shed's roof. He took a shower inside Guillermo's trailer. (V13, R1430; 1444).

After he took a shower, Aguirre saw the police arrive. The police came to ask Aguirre and his roommates some questions, and they said they had not seen or heard anything. Aguirre told the police he had been drinking "till late" and that he arrived home around 5:00 a.m. He had gone to Williams' house looking for a beer around 5:00 or 5:45 a.m. because Albertson's did not open until 7:00 a.m. When the police asked him at 11:00 a.m. if he knew anything about the neighbors, Aguirred denied any knowledge. (V13, R1431). Aquirre only spoke Spanish, and

Officer Perez spoke "Spanglish" (some words in English and some in Spanish) to him. (V13, R1432).

Later that afternoon, the police had a "bus" outside the house, and Aguirre went over "to the police to tell them that I had some information" and that he needed someone who spoke Spanish. (V13, R1432). Aguirre then told Miss Toranzo that he had gone inside Williams' residence, but he didn't call the police because he is illegal and would be deported. (V13, R1434). Aguirre did not tell the police at this point that he hand handled the knife because "when I told them that I had gone into the house, he started accusing me that I had killed them." (V13, R1435). He had planned to burn his clothes, so he put them in a bag and threw them on the roof of the shed. However, at this second police contact, he told police where to find them. (V13, R1436). Aguirre denied walking all over the house, "that I had seen the dead body, and I also denied that I had seen the knife." (V13, R1443). He told police he woke up at 11:30 a.m., found himself covered with blood, took off his clothes and put them in a bag, threw the clothes on the roof, and took a shower. (V13, R1444).

Aguirre confirmed that seven months before the murders, Samantha Williams told him not to enter her home in the middle of the night. (V13, R1437). They told him at another time not to come into the house without knocking. (V13, R1443).

On February 28, 2006, the jury returned its verdict finding Aquirre guilty as charged of two counts of first degree murder (Counts I and II) and burglary with assault or battery (Count III). (R1591).

The penalty phase of this trial began on March 9, 2006. (V14, R1). The State presented three witnesses: Dr. Beaver, medical examiner; Samantha Williams, the victims' daughter/granddaughter; and Dr. William Riebsame, forensic psychologist.

Dr. Beaver described the violent struggle which ensued between Williams and Aquirre. (V14, R32-33). Williams was found face down on the floor, clothing askew with her pants slightly pulled down. Blood was on the walls, surrounding her body and covered her clothing. She exhibited numerous injuries to her legs and arms. (V14, R33). Dr. Beaver's impression was that Williams had crawled toward the door and was attacked. (V14, R33). Williams received continuous wounds to her muscles, and extremities, causing severe blood loss. (V14, R34). The injuries to her lungs caused her chest cavity to become filled with blood and air. She would have been short of breath within a few seconds. (V14, R34). Williams suffered a great amount of extraordinary pain due to the cutting injuries. (V14, R35-36). The numerous wounds to her legs and feet were indicative of defensive wounds as Williams fought off Aquirre. (V14, R38). It was a very violent struggle. (V14, R39). Once the wounds to the lungs were inflicted, Dr. Beaver would not expect a

person to “go more than three or four minutes of consciousness.” (V14, R43). The wounds to the leg would be fatal over time, but the wounds to the lungs are more rapidly fatal. (V14, R44). A person sustaining the wound to the femoral artery of the leg would lose consciousness over time, but the person would have to “bleed out” which takes time before the blood volume drops to low enough to cause unconsciousness. (V14, R45). At some point, the amount of pain experienced from the various wounds would cause a person to lose consciousness. (V14, R47). Dr. Beaver would expect someone going through a violent struggle to vocalize. (V14, R40).

Bareis did not have any physical ailment that would have prevented her from seeing and hearing the struggle between Williams and Aquirre. (V14, R39-40; 49). Although Bareis’ stroke affected her ability move, it would not have affected her vision or hearing. (V14, R50). Bareis was most likely seated in the wheelchair when she was stabbed in the heart. (V14, R49). She could have been conscious up to twenty seconds after the first stab. (V14, R39). The stab wound to her back had the appearance of a postmortem injury. (V14, R58).

Samantha Williams testified Bareis’ stroke from nine years ago had left her paralyzed on her left side and confined to a wheelchair. (V14, R62-63). Although able to see, she had glaucoma and wore reading glasses. (V14, R63). Bareis did not have hearing or speech problems. (V14, R64). She could get into the bathroom and

onto the couch, where she slept by herself. She primarily resided in the living room area of the home. Even if the door to the living room was shut, a normal conversation could be heard in the foyer area, albeit muffled. (V14, R68). Although Bareis might doze off in her wheelchair, it was not likely for her to sleep in it. At night, she slept on the couch. (V14, R69). Samantha never saw her grandmother sleep in her wheelchair at night. (V14, R73).

The defense presented two witnesses: Sgt. John Negri, Seminole County Sheriff's Office, and Dr. Deborah Day, psychologist. The defense also admitted 26 letters supporting Aguirre. (V14, R109; V5, R634-79; Defense Exhibit #1A – 1TT). The letters were from family and friends in Honduras written on behalf of Aguirre. (V14, R110). The defense also admitted two photos of Aguirre. (V14, R117; Defense Exhibits 2 and 3; V5, R680-681).

Sgt. Negri responded to the crime scene between 10:00 and 11:00 a.m. (V14, R101-02). Aguirre approached him and spoke in Spanish. (V14, R103). Negri did not understand him and instructed Aguirre to return home. (V14, R105; 107). Although it was "possible" Aguirre may have been "drinking or something" and could have been "mildly" under the influence, he "wasn't falling down ... he wasn't throwing up, he wasn't combative, he didn't seem irrational." (V14, R105-06). Sgt. Negri had the impression Aguirre was coming over to see what was going on with his neighbor's house. (V14, R106).

Dr. Deborah Day, psychologist, conducted a forensic evaluation of Aguirre. (V14, R119; 128). In addition to interviews with Aguirre's sisters, Dr. Day reviewed Aguirre's statements to police, witnesses' statements, police statements, reports, depositions, and reviewed crime scene photos and video. (V14, R128-29). She interviewed Aguirre eleven times. (V14, R130). She administered the Minnesota Multiphasic Personality Inventory ("MMPI-II") test. (V14, R126; 131). Aguirre's test results indicated valid responses. (V14, R132). His emotional level of functioning is consistent with an adolescent. (V14, R134). He is guided by "fun, pleasure, excitement." He views the world immaturely. (V14, R135). On occasion, he was happy to see her. Other times, he was angry, and refused to communicate. (V14, R136). Dr. Day diagnosed him with a mood disorder. (V14, R185). Aguirre's sister described him as "a child in an adult's body." (V14, R136). Test results indicated some memory deficits. (V14, R166).

Dr. Day testified that Aguirre was born in Honduras "where his mother had a very difficult birth, she went into labor, she required a C-section delivery, he was born oxygen deprived."[15] (V14, R139). Aguirre was the youngest of four children, and his sister described him as a "very sickly child growing up." (V14,

[15] The State notes that this is diametrically contrary to the medical records of Aguirre's birth which state the birth was "normal," the birth was "natural," and the mother was discharged the next day. (V5, R701).

R139).[16] Dr. Day admitted on cross-examination that the sister told her Aguirre grew out of his illnesses and grew up to be a normal child physically. (V14, R197).

The parents separated when Aguirre was quite young. His father moved in with another woman. (V14, R139). Aguirre believed it was his fault his parents separated. (V14, R140-41). His mother worked as a maid, and was allowed to take Aguirre to her job until he began walking. (V14, R139). His older sister by twelve years, Karina, cared for him while his mother worked. As a young child, he was often left alone while his sister attended school. (V14, R140). Karina was a disciplinarian and frequently beat him, leaving marks. (V14, R143). His mother engaged in the same behavior, but to a lesser degree. (V14, R143). Aguirre did not consider this abusive based on the standards of discipline in Honduras. (V14, R143). Aguirre told Dr. Day that his father was an alcoholic, and his sisters said their father was violent with their mother. (V14, R142).

At age eight, Aguirre and another male friend, were sexually abused on an ongoing basis by a 13-year old female in the neighborhood. (V14, R145). Aguirre did not believe this affected him. He is still on friendly terms with the abuser. (V14, R195).

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[16] Again, this testimony is inconsistent with the records of Aguirre's childhood. The school records show that in the First Grade, he was not absent one day.

Aguirre's neighborhood was poor and gangs ran the community. (V14, R147). One of his neighbors was murdered by one of the gangs. (V14, R147). Due to his short stature, Aquirre was often teased, bullied, and beat. (V14, R149).

Aguirre earned the equivalent of a high school diploma. (V14, R148). His specialty was in accounting or finance, and he was designed to go into bookkeeping. (V14, R148). He loved to play or watch soccer, and he had a talent for singing. (V14, R162).

Aguirre came to the United States to make money and support his mother. (V14, R163). However, he was hardly able to support himself. (V14, R163). Aguirre started consuming alcohol at age twelve, and abused it regularly at age fourteen. He started abusing marijuana, paint thinner, and shoe glue. (V14, R151; 153; V15, R288-89). As marijuana was not his "drug of choice," he only used it occasionally. (V14, R152). At age eighteen, he started abusing cocaine. (V14, R156). When Aguirre moved to Florida, his sister became aware of his substance abuse problems and made him leave her home. (V14, R159). He got drugs from his roommates, Guillermo and Feliciano. (V14, R161). Although Aguirre held a few jobs, he spent his money on cocaine and alcohol. (V14, R163-64). Dr. Day noted "some memory deficits" when she met with Aguirre; however, "some of them have cleared up." (V14, R166). In Dr. Day's opinion, cocaine and alcohol dependence have a direct impact on the brain. (V14, R166-67).

Aguirre told Dr. Day the dog was not in the Williams' residence, then later said he did not remember seeing a dog. (V14, R168). Dr. Day believed the dog was actually in the room with Bareis. (V14, R170). Aguirre also told Dr. Day Bareis was on the couch when he was in the residence. (V14, R170). After viewing the crime scene video, Aguirre said it was not the way he remembered it. (V14, R171). He may have experienced dissociative traits or dissociative amnesia. People who commit murder often do not recall it. (V14, R170). Aguirre said Bareis was on the couch when he entered the home. (V14, R170). The crime scene video showed Bareis lying on the floor under her wheelchair. (V14, R170). Aguirre was "startled" when he saw the video. (V14, R171). There was no indication Aguirre was faking his memory problems. (V14, R174).

Dr. Day concluded Aguirre was suffering from alcohol and cocaine dependence[17] and was intoxicated at the time of the murders. (V14, R159; 177; 183). As Aguirre had a high tolerance for alcohol, he did not demonstrate the physiological effects on an outward appearance. (V14, R177).

Aquirre told Dr. Day that on June 16, he consumed alcohol all day and into the early hours of June 17. (V14, R178). At 2:00 to 3:00 a.m., he went to "Salvador's" house and drank more alcohol and used cocaine. (V14, R178). When

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[17] Dr. Day diagnosed Aguirre using the American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000. (V14, R179).

he arrived home, he found no beer, and knew Albertson's opened at 7:00 a.m. (V14, R178).

Dr. Day testified Aguirre's judgment and ability to plan the murders was significantly impaired by the alcohol and cocaine consumption. His actions were impulsive and unsophisticated. (V14, R180-81). In addition to the alcohol and cocaine dependence, Aguirre was suffering from a significant amount of emotional distress and his ability to appreciate the criminality of his actions was significantly impaired. (V14, R183). His intoxication did not allow him to conform his behavior to the requirements of the law. (V14, R184; V15, R206). In addition to alcohol and cocaine abuse, Day diagnosed Aguirre with a mood disorder, NOS. The mood disorder most likely contributed to the cocaine dependence. Aguirre did not have a major depressive disorder. (V14, R185).

Dr. Riebsame interviewed Aquirre and reviewed his statements to police. (V15, R237; 238). He reviewed witness statements, police reports, depositions, Aguirre's family correspondence, and the autopsy reports. He reviewed Dr. Deborah Day's depositions and Aguirre's and Sequeida's trial testimony. (V15, R231; 236-37). He administered psychological testing,[18] and reviewed the test

[18] He administered the Personality Assessment Inventory ("PAI"), a test of over three hundred questions which measures emotional or behavior problems. (V15, R238; 276). Both Dr. Day and Dr. Riebsame administered the tests in Spanish. (V15, R239).

results administered by Dr. Day. (V15, R238; 240). The tests results from Dr. Day indicated Aguirre answered questions consistently, and did not exaggerate his problems. However, tests administered by Dr. Riebsame suggest Aguirre answered in "a somewhat inconsistent or careless way." The testing location was not ideal and had some distractions. (V15, R274).[19] Test results indicated Aguirre is a paranoid, distrusting person. His emotional level is that of an adolescent. He is sensitive to insults and criticism. He "may feel like he's getting a raw deal." (V15, R241-42; 279).

Aguirre is prone to impulsive behavior without considering the consequences of his actions. (V15, R242). Scales for alcohol and drug use were elevated on all tests as well as the aggressive behavior scale. (V15, R242-43; 310). Aguirre started abusing alcohol and other inhalants at age fourteen. (V15, R288-89). Chronic use of an inhalant may form brain damage; however, Aguirre does not show a loss of cognitive function. (V15, R319-20). Aguirre substituted cocaine for inhalants at age eighteen. (V15, R291). Upon arriving in the United States, he consumed alcohol and cocaine on a regular basis. (V15, R292). There is no history of mental illness. (V15, R244).

Aguirre spoke fondly of his mother and negatively of his alcoholic, deceased father. (V15, R247; 286). His father was not involved in his life for any period of

[19] The testing was conducted at the Seminole County jail. (V15, R273).

time. (V15, R248). Generally, children with absent fathers are underachievers and have the potential to develop unhealthy relationships with women. (V15, R285-86). Aguirre denied any physical violence between his parents. (V15, R248). His mother did not experience violence from other men. Aguirre's mother "would not put the children at risk for any kind of violence." (V15, R249). He said his mother and sister disciplined him for misbehavior. (V15, R283-84). The sexual abuse by the older teenage girl did not traumatize him. He is still friendly with her. (V15, R249; 296).

Aguirre denied having any psychotic symptoms around the time of the murders. He told Dr. Riebsame that he drank all day and into the evening. He bought cocaine and shared it with a friend. (V15, R251-52; 300). He got into a fight at a billiards club until police showed up. He and his friend returned to the friend's home where they continued to drink until 3:00 a.m. (V15, R253). Aguirre returned home at 5:00 a.m. After a short while, he went over to Williams' home to get some beer. (V15, R254). The door to the home was not closed completely. He pushed on the door but it was blocked by Williams' body. After he entered, he touched Williams and knew she was dead. He tried to pick her up, and laid her legs across his lap.[20] He said "the other lady" was there and "stuff was thrown all around the house." He saw the knife, thought someone was in the home, and

[20] Aguirre told Dr. Riebsame he thought Williams had been raped because her pants were pulled down. (V15, R255).

picked it up in a defensive manner. (V15, R254). Aguirre left the scene, knife in hand. He recalled throwing the knife but not where it went. (V15, R255). He bathed, and decided not to call police due to his illegal alien status. He put his clothes in a plastic bag and tossed the bag on the roof of his shed. (V15, R255). Several hours later, police came and questioned him. Initially, he did not tell police what he had seen in the Williams' household. (V15, R255-56). His friends accused him of killing the women. (V15, R256; 312).

Dr. Riebsame testified that the police "frightened" Aquirre when they accused him of the murders. He asked for an attorney, and continued talking to police. When police claimed the murders were sexually motivated, he refused to speak further. He was arrested a week later. (V15, R256). Dr. Riebsame concluded that Aguirre was under the influence of alcohol and cocaine at the time of the murders. He was alcohol and cocaine dependent. (V15, R257). However, he does not have a mood disorder. (V15, R258; 279). Dr. Riebsame said that Dr. Day's diagnosis of mood disorder related to his present situation and the anxiety and depression of his legal dilemma. (V14, R260).

At the time of the murders, Aguirre was working, going out with friends, not anxious or depressed at that time. (V15, R260). Although Aguirre was suffering from an emotional disturbance at the time of the murders, Dr. Riebsame did not categorize it as "extreme." "Extreme" means a person who is

"hallucinating, out of touch with reality, may not know who they are, where they are, what they're doing." Aguirre is not extremely mentally or emotionally disturbed. (V15, R261-62; 313). Although he exhibits the characteristics of a borderline personality disorder, he does not meet the criteria. (V15, R280; 293; 311). He exhibits emotional instability, depression and anxiousness. His moods "wax and wane." (V15, R293). In Dr. Riebsame's opinion, Aguirre exhibits efforts to maintain social involvement and wants to be the center of attention. (V15, R294). His capacity to conform his conduct to the requirements of the law was not substantially impaired. He was not "out of touch with reality." He made decisions throughout the evening and the morning of the murders that suggested self-control. For example, Aguirre had a friend drive home from the billiards club when he knew he was too drunk. After arriving at his friend's apartment, it was too noisy, so he went home. (V15, R253; 263-64; 304).

Dr. Riebsame opined that if Bareis saw Aguirre killing Williams, Aguirre made a decision "in a controlled fashion" to kill Bareis. (V15, R266). Bareis was stabbed "rather accurately ... through the heart." (V15, R262-63; 264; 314). Aguirre's decisions were bad; it did not mean he did not appreciate what he had done. (V15, R271). Although impaired, he was not "substantially impaired." (V15, R271). His capacity to appreciate the criminality of his conduct was not impaired. (V15,

R273). In summary, at the time of the murders, Aguirre was intoxicated and there were deficits in his cognitive function. (V15, R320).

Melissa Barrios, victim advocate, read a statement from a family member. (V15, R323-327).

SUMMARY OF ARGUMENTS

Point I. The trial judge did not abuse his discretion in finding Aguirre knowingly and voluntarily waived his right to self-representation. The judge followed the colloquy endorsed by this Court. After being so advised, Aguirre told the judge he would proceed with current counsel.

Point II. The trial judge did not abuse his discretion in ruling on the motion for new trial. The *Brady/Giglio* portion of this claim was never raised at the trial level, and is waived on appeal. The trial judge properly analyzed the new evidence and weighed both the newly discovered evidence and the evidence which was introduced at the trial pursuant to *Jones*. The evidence that the palm print on the knife may not belong to Aguirre probably would not change the outcome of the trial, given the fact Aguirre testified he handled the knife and the substantial evidence against him.

Point III. The issue of whether the trial judge abused his discretion by denying the cause challenge on Juror Morse is not preserved for review. When defense counsel requested an additional peremptory challenge, he did not identify

Juror Morse as the juror who should have been stricken for cause and he did not identify Juror Weinberg as the specific juror on which he would use an additional peremptory challenge. Furthermore, Juror Morse's responses to questions did not rise to the level justifying a cause challenge. Error, if any, was harmless, and this Court should recede from the *per se* rule of *Trotter v. State*, 576 So. 2d 691 (Fla. 1991), and adopt the dissent in *Busby v. State*, 894 So. 2d 88 (Fla. 2004).

Point IV. Aguirre moved for judgment of acquittal on the burglary charge only. There was ample circumstantial evidence to support the verdict for burglary. Pursuant to this Court's automatic review of the sufficiency of the evidence on the murder charges, there is ample evidence of guilt. The victims' blood was on Aguirre's clothing and the knife used to kill them, the knife was found outside Aguirre's residence, the murder weapon had been in Aguirre's residence and was brought to the crime scene, footprints consistent with Aguirre's footwear were all over the crime scene, and Aguirre gave three different stories on his involvement.

Point V. The trial judge did not abuse his discretion in allowing Samantha Williams to testify that Aguirre had entered the residence without permission and she told him to leave and never enter without permission again. This evidence is directly relevant to the burglary charge. Aguirre alleges this was inadmissible *Williams* rule evidence; however, the evidence was relevant to opportunity, identity, knowledge and absence of mistake. Error, if any, was harmless. Aguirre

testified that seven months before the murders, Samantha told him not to enter her home in the middle of the night, and he was told at another time not to come into the house. There was ample evidence of guilt.

Point VI. The trial judge did not abuse his discretion in instructing the jury on the cold, calculated and premeditated aggravating circumstance in reference to Carol Bareis. The State presented sufficient evidence to obtain the instruction. Aguirre brought the murder weapon to the scene, could have left after he disabled Williams, and executed a strategically-placed blow to Bareis' heart. Error, if any, was harmless.

Point VII. The trial court's finding of the avoid-arrest aggravating circumstance as to Carol Bareis is supported by competent substantial evidence. There was no reason to kill Bareis except to eliminate her as a witness. Bareis knew Aguirre, he was not wearing a disguise, and he violently murdered Bareis' daughter in front of her. *Ring* is not implicated in this case because Aguirre was convicted of a contemporaneous murder, which established the prior-violent-felony aggravator and was convicted of burglary, which established the during-the-course-of-a-felony aggravator. Error, if any, was harmless.

Point VIII. The trial court findings on the heinous, atrocious aggravator are supported by substantial competent evidence. Carol Bareis watched helplessly as her daughter was violently killed in front of her. She was aware of her impending

death but was confined to a wheelchair and waited in horror for the stab to her heart. The sentence of death is proportional to other similarly situated death cases.

Points IX, X and XI. These points contain challenges to the constitutionality of Florida's death penalty statutes. This Court has repeatedly rejected the various arguments.

POINT I

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ADVISING AGUIRRE ON HIS RIGHT TO SELF-REPRESENTATION

Aguirre claims he was denied the right to represent himself in violation of *Faretta v. California*, 422 U.S. 806 (1975). He concedes that the trial judge "duly conducted" *Nelson*[21] hearings each time Aguirre voiced a complaint about counsel. (Initial Brief at 22). He also concedes that the trial judge advised him of his right to represent himself. (Initial Brief at 24). However, Aguirre argues, when he unequivocally asserted his right to self-representation at the November 8, 2005, *Nelson* hearing, the trial judge misstated the law and misled him into waiving the right to represent himself. (Initial Brief at 25-26). The State agrees that the standard of review is abuse of discretion. *Holland v. State*, 773 So. 2d 1065, 1069 (Fla. 2000).

The record shows that Aguirre launched several complaints about the progress of his trial and the representation of trial counsel. (V16, R436-455; 459-89). Each time, Judge Eaton explored the complaints thoroughly and resolved the complaints. The first such hearing was February 11, 2005. Aguirre stated he was promised discovery in Spanish but had not received any documents. (V16, R439). Defense counsel said his office had received over 1000 documents, deposed

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[21] *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973).

witnesses and was trying to locate others that had relocated. (V16, R440-42). Counsel had received a crime scene video which he planned to review with Aguirre at the jail. (V16, R443). Dr. Day, the mental health expert, had also been provided a large volume of material. (V16, R443). Counsel was reviewing an audio CD of the 911 call and an audio-taped interview of Aguirre with investigators. (V16, R444). He was in the process of having the taped interview translated into Spanish. (V16, R444). Counsel had been informed the initial translation of the interview was incorrect and was seeking another translation. (V16, R445-46). At Aguirre's insistence, counsel provided Aguirre with the incorrectly transcribed interview. (V16, R446). Counsel was very careful when discussing evidence with his client. (V16, R448). He even warned Aguirre of the dangers of having discovery material in the jail. (V16, R449). Counsel continued to prepare Aguirre for the possibility that the State might seek the death penalty. (V16, R450).

Judge Eaton explained the capital litigation process to Aguirre and found counsel was adequately representing Aguirre. (V16, R451-453). Aguirre was offered the opportunity to represent himself, but chose to have current counsel continue to represent him. (V16, R453-54).

The second *Nelson* hearing was June 10, 2005. Aguirre's complaints included not receiving information, and phone calls not being returned. (V16, R462). Aguirre also wanted copies of the DNA results, but counsel informed him

that the State had not yet provided those results. (V16, R462-63). In addition, certain requested documents had not been transcribed into Spanish. (V16, R463).

Counsel responded, stating that he continued to conduct pre-trial discovery. (V16, R464). Counsel had not received all the DNA results and did not want to depose the FDLE analysts until testing was completed. (V16, R465). Counsel had filed motions for additional discovery. (V16 R466). There had been a change in prosecutors, and the State supposedly had scheduled a meeting to determine when the DNA testing would be completed. (V16, R466-67). That meeting did not take place. (V16- R467-68). Counsel had conducted some depositions, but he was still attempting to locate several witnesses who had relocated. (V16, R469). Several depositions had to re-scheduled. (V16, R470). Counsel had been trying to provide Aguirre with documents in Spanish. (V16, R470-72, 473). One added inconvenience was that counsel needed an interpreter to discuss Aguirre's case with him. (V16, R471). An expert had examined Aguirre several times to prepare for mitigation. (V16, R474).

Judge Eaton reviewed with counsel the issues that needed to be resolved before the case would be ready for trial. (V16, R472-76). Aguirre specifically requested: (1) the statement from the daughter of the victim; (2) his taped statement to police; (3) discovery. (V16, R478). The trial judge discussed each issue with counsel. (V16, R478-84). The judge even offered to allow Aguirre to

use the court equipment to hear the audiotape since there had been difficulty playing the tape in jail. (V16, R484).

The court explained to Aguirre that capital cases take a long time to come to trial, in particular, due to forensic analysis. (V16, R478). The court explained that translating every bit of discovery into Spanish was not possible. (V16, R484; 488). The court found counsel was adequately representing Aguirre, and offered him the opportunity to represent himself. (V16, R485-86). Aguirre chose to have counsel continue to represent him. (V16, R487).

The issue on appeal involves the November 8, 2005, hearing. Counsel advised the court that Aguirre wanted to file a demand for speedy trial, and they had discussed the option. (V16, R547). Aguirre subsequently called counsel and said he did want to file the demand. (V16, R548). Counsel told Aguirre he was "not going to honor his request because we did not feel it was in his best interest." Aguirre asked for a hearing with the judge. (V16, R548). Counsel was concerned about going to trial at that point because the State was seeking the death penalty and he was not yet fully prepared to present the mitigation. (V16, R549). The mental health expert had been consulted, but they had not been able to engage in a lengthy discussion with her on the theory of mitigation. (V16, R549-50). Because Aguirre is from Honduras and had connections to Nicaragua, it was difficult not only to contact all the family members, but also the people the family members

said could produce mitigation information. (V16, R550). Counsel believed he would be fully prepared by the February trial docket, which was in three months. (V16, R552). For that reason, counsel did not want to file a demand for speedy trial. (V16, R552).

The prosecutor observed that pre-trial hearings and depositions were already set through December 14, and the depositions of other witnesses had not been set. (V16, R552-53). The State was also contemplating filing additional charges -- burglary and aggravated abuse of the elderly -- and the hearing date for consolidation was November 28. (V16, R553). The February trial date would mean Aguirre would have been in jail 20 months. (V16, R554). Further, counsel wanted to keep Judge Eaton on the case and knew that he was unavailable the rest of the year. (V16, R558).

The court informed Aguirre of the seriousness of the charges against him, and that the schedule and progress made were reasonable. (V16, R560). Aguirre felt that 17 months in jail was too long to wait for trial. (V16, R560). Further, counsel told Aguirre that he thought they would lose, and "I don't think a lawyer can tell that to his client at any time for any reason." Therefore, Aguirre wanted to fire counsel. (V16, R561).

At this point, counsel requested the prosecutor leave the courtroom. (V16, R561).

Judge Eaton advised Aguirre of his options: keep present counsel, hire an attorney, or represent himself. Aguirre said he wanted to represent himself. (V16, R562). The trial judge requested the courtroom to be cleared, and swore the defendant. (V16, R563). Aguirre stated that he was dissatisfied with the attorneys because they told him he had a "five percent chance of winning." (V16, R564). He did not think the attorneys should be so concerned about the penalty phase, yet they were not ready for the penalty phase. (V16, R564-65). Aguirre did not want to be represented by someone "who says that we're gonna lose." (V16, R567).

Judge Eaton told Aguirre he would set the case for trial as soon as possible but that would probably be after the first of the year. Aguirre stated he understood and "I don't wish to change judges." However, he did not want present counsel to remain his lawyers. (V16, R568).

Defense counsel responded to Aguirre's complaints and advised the court of the discovery he had undertaken and his assessment of the evidence. (V16, R5669-70). Aguirre told counsel that if his choices were life in prison or death, he would choose death. (V16, R575). Notwithstanding, counsel wanted to prepare a thorough penalty phase. Because all Aguirre's background materials are in Honduras and Nicaragua, that slowed the mitigation investigation. (V16, R575-76). Aguirre had just begun to "open up and give us some of the information." Aguirre

had just "within the last few months" given counsel the opportunity to have contact with members of his family. (V16, R576).

Judge Eaton found that counsel's representation was not unreasonable, so he would not "fire" them and appoint new counsel. (V16, R580). Aguirre was advised of his options: continue with present counsel, hire an attorney, or represent himself. Aguirre said he wanted to represent himself. (V16, R581).

The court then advised Aguirre of the disadvantages of self-representation. (V16, R582-88). Judge Eaton closely followed the colloquy approved by this Court in *In re: Amendments to Fla. R. Crim. P. 3.111(d)(2)-(3)*, 719 So. 2d 873, 876-78 (Fla. 1998).

Aguirre claims that the lower court abused its discretion in following the colloquy approved by this Court, specifically, the section about not having direct access to the prosecuting attorney. This caveat is expressly outlined in the colloquy approved by this Court. *In re: Amendments to Fla. R. Crim. P. 3.111(d)(2)-(3)*, 719 So. 2d at 877.[22] Aguirre's argument seems to boil down to the statement that the decision not to represent himself "flowed directly from the trial court's pre-emptive and incorrect announcement that Appellant would have no access to the prosecutor for negotiation or discovery." (Initial Brief at 26). Aguirre was advised

[22] This portion of the colloquy reads:

> Do you understand that your access to the State Attorney who is prosecuting you will be severely reduced as compared to a lawyer who could easily contact the State Attorney?

of numerous disadvantages to self-representation. He made no indication that his decision to continue with counsel was based on the fact he would not have access to the prosecutor. To the contrary, the only concern expressed by Aguirre was that the attorneys thought they were going to lose. (V16, R588).

Rule 3.111(d) provides:

> (d) Waiver of Counsel.
>
> (2) A defendant shall not be considered to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry has been made into both the accused's comprehension of that offer and the accused's capacity to make a knowing and intelligent waiver. Before determining whether the waiver is knowing and intelligent, the court shall advise the defendant of the disadvantages and dangers of self-representation.
>
> (3) Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent him or helself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel.

This Court published a model colloquy due to inconsistencies in the colloquys at the trial level. *In re Amendments to Fla. R. Crim. P. 3.111(d)(2)-(3)*, 719 So. 2d 873 (Fla. 1998). The lower court followed this colloquy line by line, reciting the numerous warnings included in that colloquy. Per Rule 3.111 and *Faretta*, a trial court must follow the colloquy to ensure the waiver of counsel is knowing and voluntary. *Faretta*, 422 U.S. at 825.

In *Porter v. State*, 788 So. 2d 917, 927 (Fla. 2001), this Court cited to the factors outlined in *United States v. Fant*, 890 F.2d 408 (11th Cir. 1989), to determine whether a defendant made a knowing and voluntary waiver:

> (1) the background, experience and conduct of the defendant including his age, educational background, and his physical and mental health;
>
> (2) the extent to which the defendant had contact with lawyers prior to trial;
>
> (3) the defendant's knowledge of the nature of the charges, the possible defenses, and the possible penalty;
>
> (4) the defendant's understanding of the rules of procedure, evidence and courtroom decorum;
>
> (5) the defendant's experience in criminal trials;
>
> (6) whether standby counsel was appointed, and the extent to which he aided the defendant;
>
> 7) whether the waiver of counsel was the result of mistreatment or coercion; or
>
> (8) whether the defendant was trying to manipulate the events of the trial.

Id. at 409-10.

The transcripts in the instant case reflect that the trial judge conducted several extensive inquiries of defendant which covered all of the areas outlined in *Fant*. He inquired as to Aguirre’s knowledge and familiarity with the legal system and also discussed the dangers and disadvantages associated with self-

representation. In the present case, once Aguirre heard the disadvantages of self-representation, he felt he had "no option" but to continue with representation. There is no indication he felt he could not represent himself solely because he would not have direct access to the prosecutor. To the contrary, Aguirre was advised of the dangers of trying to select a jury when he does not speak the language (V16, R583), qualifying jurors and making legal challenges, calling witnesses and presenting evidence despite the fact he is in custody and has no direct access to witnesses, deciding whether to testify (V16, R584), knowing the rules of evidence, preserving issues for appeal, that he would receive not special treatment or receive an earlier trial date (V16, R585), obtaining access to legal resources in English, abiding by the rules of criminal law and courtroom procedure, that he could be removed from the courtroom for being disruptive or impolite (V16, R586), and that he could not claim ineffectiveness of counsel on appeal (V16, R587).

The trial judge recognized Aguirre's right to self-representation and conducted a lengthy *Faretta* hearing. After that hearing, the judge honored Aguirre's decision to proceed with present counsel. The record shows that the trial judge followed this Court's mandates and did not abuse his discretion.

POINT II

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN RULING ON THE MOTION FOR NEW TRIAL; A PORTION OF THIS ISSUE IS NOT PRESERVED

Aguirre claims the State presented perjured testimony from the State's latent fingerprint examiner, Donna Birks. This claim contains two components:

> (1) the State suppressed favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and the State knowingly presented Donna Birks' perjured testimony at trial in violation of *Giglio v. United States*, 405 U.S. 150 (1972) (Initial Brief at 33-36);
>
> (2) the newly discovered evidence that the palm print is inconclusive requires a new trial (Initial Brief at 31-32).

Aguirre did not raise the *Brady/Giglio* issue at the trial level, and this issue is waived for appellate review. *Kelley v. State*, 974 So. 2d 1047, 1051 (Fla. 2007); *Anderson v. State*, 863 So. 2d 169, 181 (Fla. 2003); *Bertolotti v. Dugger*, 514 So. 2d 1095, 1096 (Fla. 1987) ("In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court."). The only ground raised in the Motion for New Trial was newly-discovered evidence. (2nd SR 887-889). Even if this claim had been raised below, it has no merit. There is no evidence to suggest that any State actor, including Birks herself, had knowledge the palm print identification was inconclusive. As soon as the State received information regarding Birks' identifications, both defense counsel and appellate counsel were notified. To the

extent Aguirre argues that the State has constructive knowledge because Birks, an employee of the sheriff's office, knew her identification was inaccurate, this argument strains logic. Further, there is no evidence that even Birks was aware her identification was faulty, and she did not testify at the relinquishment proceedings.

Although Aguirre also extends Birks' knowledge to the prosecutor under the same flawed theory, he relies on *Giglio* cases which are inapposite to the present case. The constructive knowledge theory fails because there is no evidence Birks perjured herself. Section 837.02, Florida Statutes, defines perjury as: "whoever makes a false statement, which he or she does not believe to be true, under oath in an official proceeding in regard to any material matter." There is no evidence whatsoever to suggest that Birks knew her identification testimony was false. In fact, when ruling on the newly-discovered evidence claim, the trial judge found:

> It is undisputed that no one involved in this case knew that Donna Birks' expertise as a latent print examiner was in doubt at the time of the trial and this could not have been discovered by the defense through the use of due diligence.

(2nd SR949).

Insofar as the newly-discovered evidence claim, the record shows that during the pendency of Aguirre's direct appeal, the State notified trial and appellate counsel that the palm print analysis conducted by Donna Birks, Seminole

County Sheriff's Office,[23] may not be accurate. Aguirre's appellate counsel filed an Unopposed Motion to Relinquish Jurisdiction for an Evidentiary Hearing. On August 20, 2007, this Court relinquished jurisdiction to the trial court to hold an evidentiary hearing. Trial counsel filed a Motion for New Trial on Grounds of Newly Discovered Evidence. (2ndSR 887-889). Judge Eaton held a hearing on September 25, 2007. (2ndSR 953-1042). Christina Barber, FDLE latent print analyst, and Jennie Ahern, Seminole County Sheriff's Office, testified at the hearing.

Judge Eaton denied the Motion for New Trial, finding:

> On April 16, 2007, the State filed Supplemental Discovery, indicating that the Seminole County Sheriff's Office had received a complaint about the quality of the latent print work performed by the Seminole County Sheriff's finger print expert, Donna Birks, and that her work was being reviewed by the FDLE. Donna Birks testified as an expert at the defendant's trial and identified a partial print on knife found near the scene to be that of the defendant. The FDLE's latent print examiners came to a contrary conclusion.
>
> **JONES STANDARD**
>
> On a claim of newly discovered evidence, the court must make a two prong inquiry. *Jones v. State*, 709 So. 2d 512 (Fla. 1998). Under *Jones,* the court must first determine if the evidence is newly discovered. To be newly discovered, "the evidence 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have

[23] Aguirre's claim on page 32 that issues at FDLE's laboratory "foreshadowed" the Birks issue is disingenuous at best. Donna Birks worked for the Seminole County Sheriff's Office, plus the issue regarding depositions of FDLE analysts involved DNA analysts, not fingerprint evaluations. (V16, R530-32).

known [of it] by the use of diligence." *Id*. at 521 [*quoting Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324-25 (Fla.1994)]. "Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *Jones,* 709 So. 2d at 521. In deciding whether the evidence would probably produce an acquittal, "the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial." Id. (*quoting Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)). In considering the second prong, the trial court should determine whether the newly discovered evidence is cumulative when considered in light of the evidence presented at the trial. *Jones,* 709 So. 2d at 521. In a death penalty case, the court must also address whether the newly discovered evidence would probably produce a different sentencing recommendation.

EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING

The evidentiary hearing on the Motion for New Trial was held on September *25,* 2007, at which time the defendant was present and represented by trial counsel, Timothy Caudill, Esquire, and James E. Figgatt, Esquire. Christina Barber testified for the defense. The State called Jenny Ahern. The defense introduced the following exhibits into evidence: Donna Birks' trial testimony (Exhibit 1); Christina Barber's report (Exhibit 2); and a report generated by a private lab regarding the finger print evidence in this case (Exhibit 3). The Court took judicial notice of the trial transcript.

LATENT PRINT EVIDENCE

At the defendant's trial, Donna Birks testified that she examined a latent print found on the presumed murder weapon, a knife, which was found in the defendant's yard, next door to the murder scene. Ms. Birks testified that the latent print on the knife belonged to the defendant.

At the evidentiary hearing, Christina Barber testified that she is a crime lab analyst with FDLE, assigned to the latent prints department. She was asked to examine the evidence in this case on May 3, 2007, and she re-examined the latent print on the knife and compared it to the known standard of the defendant. While Ms. Barber was aware of the existing trial testimony of Donna Birks, she neither reviewed the

testimony, nor the report that had been submitted, before she re-examined the print. Ms. Barber was aware of Ms. Birks' conclusions because of the writing on some of the items she examined. After conducting an independent examination of all the available photographs of the latent print on the knife handle, Ms. Barber concluded that the print was not of value for identification, which means that the latent print lacked sufficient detail to either positively identify anyone or to eliminate anyone. Given that Ms. Birks made an identification, Ms. Barber proceeded to compare the latent print with the defendant's standard, despite her conclusion that the latent print was of no value. After attempting to compare the prints, Ms. Barber again concluded that the latent print was of no value. She had four senior crime lab analysts, two crime lab analysts, and a crime lab supervisor verify her results and they all agreed with her.

The State called Jenny Ahern, another FDLE latent print examiner and senior crime lab analyst, and she testified that the print was of no value for comparison.

The State suggested at the hearing that Donna Birks might be called to testify at any retrial of the Defendant and be asked to render her opinion for what it was worth, thereby creating a battle of the experts. However, it is doubtful that the court would allow Donna Birks to testify, considering the extent to which her testimony has been discredited.

GUILT PHASE

The defendant, who is Hispanic and has limited ability to communicate in English, lived at 117 Vagabond Way, next door to the victims in this case. His dwelling was really a shed located behind a mobile home. The testimony at trial and the photographs in evidence suggest that he had no electricity, water, or bathroom facilities. He had kitchen and bathroom privileges in the mobile home. Two other Hispanic males lived in the mobile home. The connection between these three Hispanic males was employment at a restaurant, where the Defendant was hired as a dishwasher, and later was promoted to a "prep cook."

The victims, Cheryl Williams and Carol Bareis, lived at 121 Vagabond Way, next door to the defendant, in a mobile home that had

been modified with an addition that created more living space. Ms. Williams' daughter, Samantha, who was about the same age as the Defendant, also lived there. Ms. Bareis was Cheryl Williams' mother. Ms. Bareis was sixty-nine years old and confined to a wheelchair due to a stroke. At the time of the murders, Samantha was away from the residence, spending the night with her boyfriend. The door to the victim's residence was left unlocked at night.

The knife in question here was found with both victims' blood on it in the backyard of the defendant's residence, between the victims' home and the defendant's shed. The defendant's roommate testified that the knife, which was apparently the murder weapon, resembled a knife that was in the kitchen of the mobile home at 117 Vagabond to which the defendant had access. A search of both the shed and the mobile home at 117 Vagabond did not turn up any knives similar to the murder weapon. There was also evidence presented that the murder weapon probably came from the restaurant where the defendant and his roommates worked. Samantha Williams testified that her family did not own the knife and that it could not have come from the kitchen in the victims' residence.

A crime scene footwear analyst, Christine Craig, testified that she documented and collected footwear impressions in and around the victims' home. She testified that she found multiple footwear impressions in blood throughout the residence. The evidence established that there were bloody footwear impressions not only around the victims, but also traveling through the house and into Samantha Williams' bedroom. There were also footwear impressions on the back of a mirror that had been knocked onto the floor in Samantha Williams' room.

Ms. Craig collected the defendant's shoes and swabbed them for suspect blood. Ms. Craig testified that she found 67 footwear impressions inside the residence. Sixty-four of them were of value for comparison. All of them could have been made by the defendant's shoes. Ms. Craig also testified to finding 26 footwear impressions outside of the residence. Only eight of them were of value for comparison. Four were consistent with the defendant's shoes, three were consistent with the shoes of the law enforcement officers who initially responded to the residence, and one did not match either the

defendant or the law enforcement officers.

A plastic bag containing bloodstained clothing belonging to the defendant was located on top of his shed after he told law enforcement were to find it. A DNA expert, Catherine Mediaas, tested samples from the clothes, the swabs from the defendant's shoes, and the swabs from the knife. She testified that the blood from the defendant's shoes matched Cheryl Williams. The blood stains of the defendant's socks matched Cheryl Williams. Two of the blood stains from the defendant's tee-shirt matched Cheryl Williams and one matched Carol Bareis. The blood stains on the defendant's shorts and boxers matched Cheryl Williams. Ms. Mediaas also tested areas of the articles of clothing where there did not appear to be bloodstains to determine who had been wearing them, and she found the defendant's DNA on the tee-shirt, shorts and boxers. Ms. Mediaas identified Carol Bareis' DNA on the middle of the knife blade and Cheryl Williams' DNA on the handle. None of the swabs from the knife contained the defendant's DNA.

The bloodstain pattern expert, Norman Scott Henderson, testified that he examined the bloodstains on the defendant's clothing. Each sock contained a large area of contact stain and small spots consistent with dropped blood. The tee-shirt had bloodstains on both the front and back in the form of contact stains. Mr. Henderson observed contact stains on the front and back of the defendant's shorts. He also observed circular stains on the back of the shorts but there was not enough for him to determine if they were caused by impact spatter or cast off. Mr. Henderson testified that if a blood stain got on the shorts and a contact stain was placed on top of it, the subsequent stain would most likely obliterate the initial stain.

Mark Van Sandt, Samantha Williams' boyfriend, testified that he found the body of Cheryl Williams shortly after 8:45 a.m. on July 17, 2004. Mr. Van Sandt had gone to the residence to retrieve some laundry for Samantha. When he opened the front door, he saw Cheryl Williams' body on the floor by the door. Mr. Van Sandt immediately closed the door, believing that Cheryl Williams may have fallen. He then opened the door again and squeezed into the house. He could not fully open the door because Ms. Williams' body was blocking it. Mr. Van Sandt immediately called 911, and the operator instructed him to

try to resuscitate her. Upon touching Ms. Williams, Mr. Van Sandt noticed that she was extremely cold. When he checked the body, Mr. Van Sandt stepped in blood. He did not do anything further because the 911 operator instructed him to leave the residence. Mr. Van Sandt waited for law enforcement to arrive and turned his clothing over for examination. Ms. Craig examined his person for evidence. She found a few small cuts on his right arm and leg. Ms. Craig took swabs of the blood on Mr. Van Sandt's bare feet. She did not observe any other bloodstains on his person.

Samantha Williams testified to an incident involving the defendant that occurred several months prior to the murders. She testified to waking up at approximately 2 a.m. and finding him in her room, standing over her bed. She escorted him out of the house and firmly told him that he could not come into the house uninvited at night.

The medical examiner, Dr. Thomas Beaver, testified that he examined the bodies at the scene and conducted the autopsies. He testified that he found two stab wounds on the body of Carol Bareis, one to the chest and one in the back, and lacerations, contusions and abrasions on the right side of her face consistent with an impact. Based on his examination, Dr. Beaver concluded that Ms. Bareis was sitting in her wheelchair when she was stabbed in the chest. The chest wound went through her heart and completely severed the left ventricle. Dr. Beaver concluded that this wound caused her blood pressure to rapidly drop to zero and that she died within twenty seconds of receiving the wound. The second stab wound occurred when she was slumped over and contains features consistent with a postmortem wound because the chest wound caused such a rapid loss of blood pressure. Dr. Beaver concluded that the cuts on her face were consistent with Ms. Bareis hitting her face when she fell out of the wheelchair and onto the floor.

Dr. Beaver identified 129 sharp force injuries on the body of Cheryl Williams. Some of them were cuts and some were stabs. Dr. Beaver identified numerous defensive wounds both on her hands and on her lower legs. Dr. Beaver identified three serious wounds. There was a stab wound to Ms. Williams' right leg that hit the femoral artery. According to Dr. Beaver, this wound caused a significant amount of blood loss but it was not the cause of death. However, Dr. Beaver did

indicate that the blood loss from that wound could have eventually caused her death. Dr. Beaver also identified two other stab wounds, each of which punctured her lungs. Dr. Beaver stated that the wounds that hit her lungs were the fatal wounds. Dr. Beaver testified that he believed that at one point during the attack, Ms. Williams was standing and facing her attacker, which resulted in defensive wounds on her hands and arms. At some point, Ms. Williams was on the ground on her back using her feet to try to defend herself. Then she was on the ground trying to crawl away. Dr. Beaver testified that he believed that the fatal wounds were inflicted near the end of the struggle and that Ms. Williams had been in a vigorous and extremely violent struggle for her life.

Dr. Beaver testified that the wounds on both bodies were consistent with having been caused by the knife found in the defendant's yard. Dr. Beaver also opined that Cheryl Williams was murdered first.

The defendant testified in his own defense at the trial. He testified that he went over to the victims' home around 6 a.m. looking for beer. He stated that when he arrived, the door was partially open. He testified that he went into the house and found Cheryl Williams on the floor with blood everywhere. The defendant stated that he touched Ms. Williams' neck and that he bent down and put her over his legs to see if she was alive. Then he put her back. At that point, he saw the knife on top of a box. The knife resembled a knife he had seen at his home. The defendant then went into the room occupied by Carol Bareis. The door to the room was open, and when he went in he found Ms. Bareis under the table. The defendant testified that he went to Ms. Bareis and checked to see if she was breathing. He then went back to Ms. Williams' body and picked up the knife. The defendant called out to see if anybody was there and then went to Samantha Williams' room. He saw that everything was thrown about and left the residence with the knife. The defendant went to his room and considered calling the police but decided not to because he was an illegal immigrant. He then removed his clothes and placed them in a plastic bag, which he threw on the roof of his shed. Then he went to bathe. At some point, he discarded the knife.

The defendant admitted that he gave two statements to law enforcement that were inconsistent with his trial testimony. When he

was initially contacted by law enforcement, he denied knowing anything about the murders. The defendant testified that as a result of his friends teasing him, he subsequently went to tell law enforcement that he found the bodies. During his second contact with law enforcement, he stated that he had only found Cheryl Williams' body and that he had only been in the entrance way of the home. He explained that he did not disclose finding the knife or finding Carol Bareis because the officer had started accusing him of committing the murders. It was during this second contact with law enforcement that crime scene analyst Jacquline Grossi examined the defendant for injuries, collected a DNA standard from him, and collected nail scrapings from under his fingernails. No evidence was introduced that the defendant had any injuries and no evidence of testing on the fingernail scrapings was introduced.

FINDINGS AS TO GUILT PHASE

The evidence that the latent print on the knife is of no value for comparison and that the print lacked sufficient detail to either positively identify anyone or to eliminate anyone constitutes newly discovered evidence. It is undisputed that no one involved in this case knew that Donna Birks' expertise as a latent print examiner was in doubt at the time of the trial and this could not have been discovered by the defense through the use of due diligence.

The impact of this newly discovered evidence is another matter. Even if the testimony at trial had shown that the print on the knife was of no value, the jury would not have acquitted the defendant. The evidence established that the victims' blood was on the defendant's clothes, that there were footprints throughout the house, in blood, that were consistent with the defendant's shoes, and that Samantha Williams previously found the Defendant in the home at night, uninvited. Significantly, there was no evidence of anyone but the victims, the defendant, Van Zant, and the law enforcement officers being present at the bloody crime scene. The forensic evidence simply does not support the defendant's version of events. Furthermore, the fact that the defendant testified to handling the knife renders Donna Birks' testimony about finding the defendant's print on the knife cumulative.

Defense counsel argued that Donna Birik's testimony caused the defendant to decide to testify and he would have remained silent, but

for this testimony. There is no evidence of that other than counsel's speculation. However, the evidence presented at trial was so damning that the defendant would have had to respond if there was to be any hope of an acquittal.

The Court had evaluated the weight of both the newly discovered evidence, and the evidence introduced at trial, and concludes that the newly discovered evidence would probably not produce an acquittal on retrial.

PENALTY PHASE

The Court must now consider whether the newly discovered evidence would have impacted the jury's recommendation of death.

During the penalty phase, the State presented the following aggravating circumstances for the murder of Cheryl Williams: (1) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the Defendant was engaged in the commission of a burglary; and (3) the capital felony was especially heinous, atrocious or cruel. The first two aggravating circumstances were established with the guilt phase verdicts. The State presented the following aggravating circumstances for the murder of Carol Bareis: (1) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the defendant was engaged in the commission of a burglary; (3) the capital felony was especially heinous, atrocious or cruel; (4) the victim of the capital felony was particularly vulnerable due to advanced age or disability; and *(5)* the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense or moral or legal justification. The first two aggravating circumstances were established with the guilt phase verdicts.

The defense presented several mitigating circumstances that mainly focused on the defendant's dependency on alcohol and cocaine, as well as a history of using other drugs. The defense presented the following mitigating circumstances: (1) the murders were committed while the Defendant was under the influence of extreme mental or

> emotional disturbance (the experts disagreed as to whether it was extreme); (2) at the time of the murders, the capacity of the defendant to appreciate the criminality of his conduct was substantially impaired or the defendant's capacity to conform his conduct to the requirements of the law was substantially impaired; (3) the age of the defendant at the time of the murders (the evidence established that he had the mental maturity of an adolescent); (4) the defendant suffered from a long term problem with substance abuse; (5) the defendant was raised in a dysfunctional family setting; (6) the defendant suffered from physical abuse as a child; and (7) the circumstances of the defendant's birth show that he suffered from oxygen depravation and possible brain damage.
>
> **FINDINGS AS TO PENALTY PHASE**
>
> The focus of the penalty phase was the manner in which the murders were committed and the background of the Defendant. Donna Birks' testimony pertained to the identity of the assailant. The identity of the perpetrator was not at issue during the penalty phase. Therefore, the fact that this testimony has been discredited has little bearing on the jury's sentencing recommendation. If the evidence presented during the guilt phase had been that the print was of no value, the jury would probably still have recommended death.
>
> The Court has evaluated the weight of both the newly discovered evidence and the evidence introduced at the trial and concludes the newly discovered evidence would probably not produce a different recommendation as to the penalty to be imposed.

(2ndSR940-952).

Although not cited by Aguirre, the controlling precedent on newly-discovered evidence is *Jones v. State*, 709 So. 2d 512 (Fla. 1998). The trial judge correctly analyzed the evidence under the *Jones* standard and made extensive findings of fact. Absent an abuse of discretion, a trial court's order denying a motion for new trial will not be disturbed on appeal. *Woods v. State*, 733 So. 2d

980, 988 (Fla. 1999); *See also Jones v. State,* 709 So. 2d 512, 515 (Fla. 1998); *State v. Spaziano,* 692 So. 2d 174, 178, (Fla. 1997).

Although Aguirre argues he would not have testified if he had known of Birk's inaccuracy (Initial Brief at 32), Aguirre did not testify at the relinquishment proceeding, and this is sheer speculation. The State evidence consisted of the victims' blood on Aguirre's clothes which were found on top of his shed, the knife found between his residence and the crime scene, footprints consistent with Aguirre's footwear were prevalent inside the crime scene, three inconsistent sworn statements, proximity to the crime scene, and admissions he was at the crime scene and handled the murder weapon. Aguirre also seems to find fault with the trial court's finding that, given the new evidence, the jury would "probably" still convict. (Initial Brief at 32). The *Jones* standard of review is that "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *Jones v. State*, 709 So. 2d at 532 (Fla. 1998). Judge Eaton accurately followed *Jones* in finding that "the newly discovered evidence would probably not produce an acquittal on retrial" and "the newly discovered evidence would probably not produce a different recommendation as to the penalty to be imposed." (2ndSR950, 951).

POINT III

THE TRIAL COURT DID NOT COMMIT MANIFEST ERROR IN RULING ON THE CAUSE CHALLENGE TO JUROR MORSE; THIS ISSUE IS NOT PRESERVED

Aguirre claims the trial judge abused his discretion in ruling on the cause challenge lodged against Juror Morse, and that he preserved this issue by requesting an additional peremptory challenge in order to excuse Juror Weinberg. He admits he did *not* identify Juror Morse as the juror on which his cause challenge was improperly denied, but claims this "is of no import." (Initial Brief at 43). Aguirre cites no case law to support his position.

Preservation. The law regarding preservation of a juror-for-cause issue is well-settled that:

> Under Florida law, "to show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." *Pentecost v. State,* 545 So. 2d 861, 863 n.1 (Fla. 1989). By this we mean the following. Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted. The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial.

Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990).

The record shows the following during the final strike conference:

THE COURT: Is that jury acceptable?

MS. HORAN: May we have a moment?

(Whereupon, a brief pause was had.)

MS. HORAN: Judge, State has a back strike.

THE COURT: All right.

MS. HORAN: Gonna strike Mr. McCarthy.

THE COURT: That brings up Mrs. Weinberg, State.

MS. HORAN: Acceptable.

MR. CAUDILL: Judge, we would . . . we've used ten peremptories at this point in time?

THE COURT: I think so.

MR. CAUDILL: We would ask for additional peremptory challenges and the basis for that is we were earlier forced to use a peremptory challenge on Miss Glenna Robinson after the denial of the challenge, or actually, no, it wasn't ours.

MR. CARTER: Glenna Robinson –

MS. HORAN: She was ours.

MR. CAUDILL: You're correct. I was looking through my list and trying to --

MR. CARTER: Actually, just for the record, Glenna Robinson was excused for cause. Carol Robinson is one they moved for cause, didn't get struck but the State struck her later.

MR. CAUDILL: There was a juror, Your Honor, I just need to take a moment because there was a juror that we moved for challenge for cause and I believe we ended up using a peremptory on her.

(Whereupon, a brief pause was had.)

MR. CAUDILL: I'm sorry. Are we at twelve now?

THE COURT: Yes.

MR. CAUDILL: I thought so.

MR. FIGGATT: But includes Miss Weinberg?

THE COURT: Yes.

MR. CARTER: Yes, it includes Miss Weinberg.

MR. CAUDILL: That includes Miss Weinberg.

(Whereupon, a brief pause was had.)

THE COURT: Is that right, DJ?

THE CLERK: Yes, that's right.

THE COURT: Okay. So the --

MR. CARTER: I could name them for the record if Court wants.

THE COURT: -- potential jurors then from this morning are Arrington, Baker and Weinberg?

THE CLERK: Yes.

THE COURT: Okay. Because they back struck Miss Finley. Okay.

THE CLERK: Uh-huh.

MR. CAUDILL: The State back struck Mr. McCarthy or struck Mr. McCarthy.

Judge, I apologize for taking the time, but I'm just . . . I have a memory of somebody that . . . we've been through a lot of people, I have a memory of somebody that we moved to challenge for cause and the Court denied our challenge and we struck that juror, and I'm just trying to look back in my notes and see if I can remember who that was because I'm considering asking the Court for an additional challenge, and I just wanted to look at my notes for a moment and see if I can -- (Whereupon, a brief pause was had.)

MR. CAUDILL: Judge, it appears we have no additional challenges.

THE COURT: All right. How about . . . see can we get two alternates.

(R678-81).

First, defense counsel never specifically identified Ms. Weinberg as the juror he would strike if he had an additional peremptory. In fact, the record in unclear whether defense counsel was pleased or displeased with Miss Weinberg being included on the jury. He made a point to clarify whether Miss Weinberg was on the jury; however, he never identified that she was the juror on which he would have used an additional peremptory.

Second, defense counsel never identified the juror that allegedly should not have been stricken for cause and, therefore, required that the judge afford an additional peremptory challenge. The trial court was never given the opportunity to rule, and did not rule, on the motion for an additional peremptory challenge. Defense counsel simply abandoned the issue by stating “we have no additional challenges.” (V9, R681). Failure to obtain a ruling on a motion fails to preserve the issue for appeal. It is well-established that a party must secure a ruling on a

motion before seeking appellate review; otherwise, the issue is waived. *See Rose v. State*, 787 So. 2d 786, 797 (Fla. 2001) ("The failure of a party to get a timely ruling by a trial court constitutes a waiver of the matter for appellate purposes."); *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983) (noting that appellant, having failed to pursue or obtain a ruling on his motion, did not preserve the issue for appeal); *Carratelli v. State*, 832 So. 2d 850, 856 (Fla. 4th DCA 2002) (listing the "plethora of Florida cases" supporting the notion that a party must obtain a ruling from the trial court in order to preserve an issue for appellate review). *See also Rhodes v. State,* 33 Fla. L. Weekly S190, 193 (Fla. Mar. 13, 2008).

Merits of cause challenge. In addition to not being preserved, this issue has no merit. A trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror competency. *Barnhill v. State*, 834 So. 2d 836, 844 (Fla. 2002). This is because trial courts have a unique vantage point in their observation of jurors' voir dire responses. Therefore, this Court gives deference to a trial court's determination of a prospective juror's qualifications and will not overturn that determination absent manifest error. *Hertz v. State*, 803 So. 2d 629, 638 (Fla. 2001).

Where a prospective juror is challenged for cause on the basis of his or her views on capital punishment, the standard that a trial court must apply in determining juror competency is whether those views would prevent or

substantially impair the performance of a juror's duties in accordance with the court's instructions and the juror's oath. *Id*. (*citing Wainwright v. Witt*, 469 U.S. 412, 424, (1985)). "In a death penalty case, a juror is only unqualified based on his or her views on capital punishment, if he or she expresses an unyielding conviction and rigidity toward the death penalty." *Barnhill*, 834 So. 2d at 844. Although Juror Morse initially stated that she was in favor of the death penalty (V7, R243), she ultimately stated she would "consider all possibilities." (V7, R299). The trial judge found that Juror Morse "didn't say that she was not going to consider both possible penalties." (V7, R329). Defense counsel then struck Juror Morse, using his third peremptory challenge. (V7, R329).

This case is similar to both *Barnhill* and *Conde v. State*, 860 So. 2d 930 (Fla. 2003). In *Barnhill*, the prospective juror said "I strongly agree with the death penalty. I think if you kill you should be executed." However, he subsequently said he could follow the judge's instructions and put aside his personal beliefs. *Barnhill*, 834 So. 2d at 844. A second juror in *Barnhill* indicated that she believed in the death penalty and had her own opinions as to when it should be imposed. The juror subsequently said she was willing to listen to the evidence and would consider life imprisonment based on what she heard. This Court noted that

> [J]urors who have expressed strong feelings about the death penalty nevertheless may serve if they indicate an ability to abide by the trial court's instructions. *Johnson v. State*, 660 So. 2d 637, 644 (Fla. 1995) (*citing Penn v. State*, 574 So. 2d 1079 (Fla. 1991).

Barnhill, 834 So. 2d at 845.

In *Conde*, the challenged venireman initially stated that he felt the death penalty should be mandatory in some circumstances, but upon further questioning, stated that he could follow the court's instructions to weigh aggravating and mitigating circumstances in deciding what sentence to recommend. This Court found that the juror's answers "as a whole do not present an unyielding conviction and rigidity toward the death penalty." *Conde*, 860 So. 2d at 939. The trial judge, as in *Conde* and *Barnhill,* did not abuse its discretion in denying the cause challenge to Juror Morse "where a prospective juror initially states a preference for the death penalty but later states that he can follow the law upon court instruction.", *Conde*, 860 So. 2d at 939; *Barnhill*, 834 So. 2d at 845. Thus, there was no manifest error with regard to this juror. *Id.* Additionally, this Court should recede from the *per se* rule of *Trotter v. State*, 576 So. 2d 691 (Fla. 1991), and adopt the dissent in *Busby v. State*, 894 So. 2d 88 (Fla. 2004).

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING ON THE MOTION FOR JUDGMENT OF ACQUITTAL; THIS ISSUE IS NOT PRESERVED

Aguirre acknowledges that the motion for judgment of acquittal made at the trial level only addressed the burglary conviction. The full extent of the motion was:

> MR. CAUDILL: Your Honor, I would make a motion for judgment of acquittal as to what is now Count Three of the indictment, the burglary count.
>
> Even in the . . . the evidence, even in the light most favorable to the State, I would argue, does not establish a prima facie case for burglary in terms of the concept of my client having . . . if he entered into the house, entered in the house without consent of any individuals who were in the house or who had the ability to give consent.
>
> The only evidence in this trial that would perhaps suggest a lack of consent was the testimony that was introduced over our objection by Samantha Williams. She testified that an incident that she appeared to recall from seven months prior to the death of her mother and grandmother were that she said she'd found our client in the house at night and she had warned him that night and again the next morning that he was not to come in the house at that time of the night, again, and that was what her testimony was. It was not a complete prohibition from him returning to that house, and although her memory wasn't exact, she testified on cross-examination that she believed that our client had been in the house with consent between the time, whenever that happened, and the time of the death of her mother and grandmother.
>
> What you have in the evidence, Your Honor, is a window from about, as I heard it, from about eleven, eleven thirty at night, which is the last time somebody seems to claim to have seen either one of Miss Bareis

> and Miss Williams, and from the State's evidence, about nine o'clock or so the next morning Mr. Van Sandt shows up and he says he finds at least Miss Williams.
>
> You also have the evidence that comes from more than one witness that Miss Bareis was . . . appeared . . . or was in a wheelchair at the time of the attack on her, and you had the testimony from . . . that comes from the medical examiner, you have the testimony from Samantha Williams that normally her grandmother got up around six thirty a.m., and that she believed that's what she would do is she would get into . . . she would sleep on the sofa in that room and she would get into her wheelchair.
>
> So there isn't any evidence, again, if our client did go into the house, when he went in and that he went in stealthily or that he went in without consent with the intent to commit a crime.
>
> THE COURT: Okay. Any motions as to the first two counts?
>
> MR. CAUDILL: No, sir.
>
> THE COURT: All right. I'm gonna deny the motion as to Count Three. I think the circumstantial evidence is strong enough for the jury to make a decision.
>
> (V13, R1406-08).

Florida Rule of Criminal Procedure 3.380(b) requires that a motion for judgment of acquittal "fully set forth the grounds on which it is based." Therefore, the judgment of acquittal issue was preserved as to the burglary charge, but not the murders.

<u>Murder convictions.</u> Notwithstanding the fact Aguirre did not move for judgment of acquittal on the murder charges, this Court has the inherent authority

to review the sufficiency of the evidence in capital cases. *Fla. R. App. P. 9.142(a)(6)*. The standard of review for this Court's independent review is:

> [W]hether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.

See Simmons v. State, 934 So. 2d 1100, 1111 (Fla. 2006) (quoting *Bradley v. State*, 787 So. 2d 732, 738 (Fla. 2001). *See also Bevel v. State*, 33 Fla. L. Weekly S202 (Fla. Mar. 20, 2008).

The State presented the following evidence:

- The defendant lived at 117 Vagabond Way in a shed adjoined to a trailer. The victims lived next door at 121 Vagabond;

- The defendant worked at the same restaurant as his two roommates, and the knife used to stab Williams and Bareis was the same type used in the restaurant.

- Aguirre's roommate testified that a knife like the murder weapon had been at Aguirre's residence before the murders;

- After the murders, the knife was not found during a search of both Aguirre's shed and the mobile home at 117 Vagabond:

- The knife was found in the backyard of the defendant's residence, between the victims' home and the defendant's shed;

- Samantha Williams testified that her family did not own the knife and that it could not have come from the kitchen in the victims' residence;

- Dr. Beaver testified that the wounds on both bodies were consistent with having been caused by the knife found in the defendant's yard.

- Bloody footwear impressions surrounded the victims and were present

throughout the house and into Samantha Williams' bedroom;

- Of the 67 footwear impressions inside the residence, 64 could have been made by the defendant's shoes;
- Of the 26 footwear impressions outside the residence, 8 were of value for comparison and 4 were consistent with the defendant's shoes;
- A plastic bag containing Aguirre's bloodstained clothing was located on top of his shed;
- Aguirre's DNA was on the black T-shirt, orange shorts and blue boxers;
- Blood found on Aguirre's shoes matched the DNA of Cheryl Williams;
- Blood found on Aguirre's socks matched the DNA of Cheryl Williams;
- Two of the blood stains from on Aguirre's T-shirt matched Cheryl Williams and one matched Carol Bareis;
- Blood stains on Aguirre's orange shorts and blue boxers matched the DNA of Cheryl Williams;
- Carol Bareis' DNA was on the middle of the knife blade;
- Cheryl Williams' DNA was on the handle of the knife;
- Bloodstain pattern expert, Norman Scott Henderson, examined the bloodstains on the Aguirre's clothing. The socks showed small spots consistent with dropped blood;
- There were impact and/or cast-off bloodstains on the back of the orange shorts;
- Several months prior to the murders, Aguirre was in Samantha Williams' bedroom around 2:00 a.m. She escorted him out of the house and firmly told him that he could not come into the house uninvited;
- Aguirre made three inconsistent statements: two to the police and one at

trial;[24]

- Aguiire admitted being at the crime scene because he was looking for beer;

- Aguirre admitted he held the knife;

- After he left the crime scene, Aguirre put his clothes in a plastic bag and threw them on the roof of his shed. Then he went to bathe. The blue boxers with blood were found in the bathroom.

- Williams was stabbed 129 times and had numerous defensive wounds. Bareis was stabbed through the heart, then through the back.

Despite the fact Aguirre did not move for judgment of acquittal, he cites to the standard of review for circumstantial evidence.[25] His "reasonable" hypothesis of innocence is based on his trial testimony. (Initial Brief at 47). He testified that he happened upon the crime scene, got Williams blood on himself when he "attempted to rouse" the victim, picked up the for knife for self-defense then patrolled the crime scene searching for the "real culprit," and only lied to the police twice because he was afraid of being deported. (Initial Brief at 47-48). Aguirre's

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[24] When initially contacted by law enforcement, Aguirre denied knowing anything about the murders. He later told police he found Cheryl Williams' body and that he had only been in the entrance way of the home.

[25] Even if this Court applied the general standard of review for a judgment of acquittal, Aguirre's argument fails. This Court has repeatedly reaffirmed the general rule established in *Lynch v. State*, 293 So. 2d 44 (Fla. 1974), that courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. *Id.* at 45; *see Gudinas v. State*, 693 So. 2d 953 (Fla. 1997); *Barwick v. State*, 660 So. 2d 685 (Fla. 1995).

story is ludicrous. Williams was stabbed 129 times, died in a massive pool of blood, and was so obviously dead that no reasonable person would believe Aguirre tried to rouse her. More unbelievable is that Aguirre would pick up the knife because he was afraid the "real culprit" was in the residence, then walk about the trailer looking for this violent murderer. Even under the circumstantial-evidence standard of review, the State would prevail.

There was ample evidence to support the jury's verdict. Although Aguirre argues that there was no burglary and thus no felony murder, there was ample evidence of premeditated murder from the multiple stabs wounds to Williams and the strategically-placed wound that severed Bareis' heart.[26]

Burglary. In circumstantial evidence cases, "a judgment of acquittal is appropriate if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." *Barwick*, 660 So. 2d at 694. Therefore, at the outset, "the trial judge must first determine there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences." *Barwick*, 660 So. 2d at 694. After the judge determines, as a matter of law, whether such competent evidence exists, the "question of whether the evidence is inconsistent with any other reasonable inference is a question of fact for the jury." *Long v. State*, 689 So. 2d 1055, 1058 (Fla. 1997). *Gordon*, 704 So. 2d

[26] The trial judge found the murder of Bareis was cold, calculated and premeditated.

at 112-13; see also *State v. Law*, 559 So. 2d 187, 188-89 (Fla. 1989) (applying circumstantial evidence rule to determination of motion for judgment of acquittal). On review, this Court views conflicting evidence in a light most favorable to the state. *See Peterka v. State*, 640 So. 2d 59, 68 (Fla. 1994). So long as competent, substantial evidence supports the jury's verdict, it will not be overturned on appeal.

Aguirre argues that the State “could not prove that appellant entered the home without consent.” (Initial Brief at 47). The State presented testimony that Aguirre was told not to enter the residence. The knife was brought to the murder scene. Williams put up a violent struggle throughout the residence warding off the 129 stab wounds Aguirre inflicted. As the trial judge found, there is substantial circumstantial evidence from which the jury could find a burglary. Aguirre’s argument on consent is argument is a throwback to *Delgado v. State*, 776 So. 2d 233 (Fla. 2000), which has been superseded by Section 810.015, Fla. Stat. (2002).[27] Section 810.015(3) clearly states that:

> It is further the intent of the Legislature that consent remain an affirmative defense to burglary and that the lack of consent may be proven by circumstantial evidence.

Aguirre presented no evidence he had consent to enter and did not testify to this during the trial. Competent, substantial evidence supports the trial court's and the jury's conclusion that the murders of Williams and Bareis were committed in

[27] The present murders took place on June 16, 2004, well after the enactment of Sec. 810.015.

the course of a burglary. Aguirre either entered Williams' home uninvited with the intent to commit a felony therein, or, notwithstanding an invitation, remained in her home to commit or attempt to commit a forcible felony. §810.02(1)(b)(1), (2)(c), Fla. Stat. *See also Carter v. State*, 33 Fla. L. Weekly S102 (Fla. Feb. 14, 2008).

The fact that Aguirre presented self-serving contradictory testimony is unavailing because the circumstantial evidence rule does not require the jury to believe the defendant's version of the facts where the State has produced conflicting evidence. *See Spencer v. State*, 645 So. 2d 377, 381 (Fla. 1994); *DeAngelo v. State*, 616 So. 2d 440, 442 (Fla. 1993); *Holton v. State*, 573 So. 2d 284, 289-90 (Fla. 1990). Once competent evidence has been submitted to the jury, determining the credibility of witnesses is solely within the province of the jury. *See Davis v. State*, 703 So. 2d 1055, 1060 (Fla. 1997); *Terry v. State*, 668 So. 2d 954, 962 n.9 (Fla. 1996); *Holton*, 573 So. 2d at 290. After hearing all of the evidence in this case, the jury clearly chose not to believe Aguirre's version of the facts. There is ample evidence to support the burglary conviction.

POINT V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING ON THE OBJECTION TO SAMANTHA WILLIAMS' TESTIMONY

On pages 49-53, Aguirre argues that the trial judge abused his discretion in allowing Samantha Williams to testify that Aguirre had entered the residence about seven months before the murders, and she told him in no uncertain terms to leave. Although Aguirre was charged with burglary (1stSR881) he claims this testimony was inadmissible *Williams*[28] rule evidence and the danger of unfair prejudice outweighs the probative value. He also claims the evidence was the "feature" of the prosecutor's closing argument.

This issue was first addressed during pre-trial motions on February 17, 2006. (V17, R690-96). The State had filed a notice of similar fact evidence (V2, R216); however, the evidence that Aguirre was told not to enter the Williams' residence was not really *Williams* rule evidence. (V17, R694). The evidence was "straight competent evidence" of the burglary. (V17, R694). The State filed the notice in an abundance of caution so they didn't get in the middle of trial and "all of the sudden I'm being argued it *Williams* rule." (V17, R694). Judge Eaton reserved ruling on the statement made by Cheryl Williams, but ruled that Samantha's statement:

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[28] *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

> [t]elling him not to be back in the house, that puts him on notice he's not welcome and one of the elements of burglary is entering without permission.

(V17, R694). The prosecutor said he would proffer all the testimony before it was admitted. (V17, R694).

Before Samantha testified, the trial judge required the State to proffer her testimony so he could rule on admissibility. (V9, R758-767). The proffer included that Samantha's mother, victim Cheryl Williams, told Samantha that Aguirre came into the trailer a week before the murders and she told him to leave. (V9, R760). Cheryl told Samantha she did not want Aguirre in the home, and he was not welcome there at any time. (V9, R760-61, 763). A previous incident occurred several months prior to the murders when Samantha awoke to find Aguirre standing over her bed. (V9, R767). She yelled at him, and told him to get out of the house. (V9, R766). She showed him to the door and locked it behind him. (V9, R766). The next day, she told him not to come into people's house at that time of night unless he was invited. (V9, R767). The judge ruled that the victim's testimony was not admissible, but Samantha's testimony was. (V9, R767).

Samantha testified that Aguirre had been at the house and had been invited "sometimes." (V9, R772). At first, the Williams' dog did not like Aguirre, but eventually the dog did like him. (V9, R772-73). About seven months before the murders, Aguirre was standing over Samantha's bed. She told him to "get the f—k

out of my house." (V9, R774). Aguirre understood what she said. He left and Samantha locked the door behind him. (V9, R775). The next day, she told him:

> It wasn't right to go around walking into people's houses after dark. That's not the way it's supposed to go. You know, if you're invited, you're welcome. If you're not, you don't just come over after dark basically is what I told him, unless he's invited over to the house. I asked him not to come over again.

(V9, R775). She was really angry when she found Aguirre in the house and emphatically "depicted to him that I didn't want him there again." Aguirre seemed to understand what she was saying. (V9, R776).

As the trial judge found, this testimony is directly relative to the lack of consent in the burglary charge. In fact, Aguirre claims in Point IV herein that the State failed to prove lack of consent.

Even if this testimony were *Williams* rule evidence, it is admissible. Section 90.404(2)(a) provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

The testimony was relevant to intent, identity and lack of mistake. Any evidence tending to prove those issues was relevant. *Conde v. State*, 860 So. 2d 930, 947 (Fla. 2003). The standard of review is abuse of discretion. *Id.* The testimony was brief, it was minimal compared to the brutal murders of the two

victims, and it was not a feature of the trial. This trial consisted of 12 witnesses and over 700 pages of testimony. The segment cited by Aguirre is a minor portion of the testimony. The jury was instructed that closing argument is not evidence. (V13, R1485).

Error, if any, was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). On cross-examination, Aguirre testified that seven months before the murders, Samantha Williams told him not to enter her home in the middle of the night. (V13, R1437). He was also told prior to the murders not to come in the house without knocking. (V13, R1443). Further, there was ample evidence of Aguirre's guilt, including the victims' blood on Aguirre's clothing, the knife found outside Aguirre's residence, the fact the knife had been in Aguirre's residence and was brought to the crime scene, footprints consistent with Aguirre's footwear all over the crime scene, and three different stories given by Aguirre.

POINT VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN INSTRUCTING THE JURY ON THE COLD, CALCULATED, PREMEDITATED AGGRAVATING CIRCUMSTANCE.

Aguirre claims the trial judge abused his discretion in instructing the jury on the aggravating circumstance of cold, calculated, and premeditated ("CCP"). The instruction was given only as to victim Bareis. (V14, R387). The trial judge ultimately did not find the aggravating circumstance of CCP because:

> This aggravating circumstance was not proven beyond a reasonable doubt. The jury verdict did not indicate whether the murders were premeditated, felony murders, or both. The Court has independently found that the murders were premeditated. However, the heightened premeditation needed to establish this aggravator has not been proven beyond a reasonable doubt. *Fennie v. State*, 648 So. 2d 94 (Fla. 1994); *Jackson v. State*, 648 So. 2d 895 (Fla. 1994); *Walls v. State*, 641 So. 2d 381 (Fla. 1994).

(V3, 424).

The State presented evidence that the murder of Carol Bareis was CCP. Dr. Beaver's opinion was that the murder of Bareis occurred after the murder of Williams. Bareis had no impediments of hearing or sight. She was, however, confined to a wheelchair as Aguirre stabbed her daughter 129 times in a violent struggle. Aguirre then stabbed Bareis in the chest, severing her heart. As she fell forward, Aguirre stabbed her in the back. The stab wounds were strategically placed. Because there was evidence presented to support the CCP aggravator; it

was not error for the trial court to instruct the jury. *Hunter v. State*, 660 So. 2d 244, 252 (Fla. 1995). *See also Floyd v. State*, 850 So. 2d 383, 405 (Fla. 2002)(instructed jury on HAC, not found in sentencing order); *Raleigh v. State*, 706 So. 2d 1324, 1327-28 (Fla. 1997)(pecuniary gain). In *Bowden v. State*, 588 So. 2d 225, 231 (Fla. 1991) this Court stated:

> The fact that the state did not prove this aggravating factor to the trial court's satisfaction does not require a conclusion that there was insufficient evidence of a robbery to allow the jury to consider the factor. Where, as here, evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required.

This court has held that advance procurement of weapon is evidence of CCP. *Rodriguez v. State*, 753 So. 2d 29, 48 (Fla. 2000); *Sireci v. Moore*, 825 So. 2d 882, 886 (Fla. 2002) (acquisition of a tire iron). Aguirre brought the knife from his residence to the crime scene. *See Zakrzewski v. State*, 717 So. 2d 488, 492 (Fla. 1998) (defendant purchased the murder weapon the morning before the murders). However, such procurement need not be that far in advance. *See Buzia v. State*, 926 So. 2d 1203, 1215 (Fla. 2006) (defendant went into garage and obtained axe); *Jackson v. State*, 704 So. 2d 500, 505 (Fla. 1997) (defendant went upstairs, obtained a gun, and made a deliberate and conscious choice to shoot a law enforcement officer).

Aguirre had the opportunity to leave the residence after he disabled Williams. This Court has found heightened premeditation where a defendant had

the opportunity to leave the crime scene and not commit the murder but, instead, committed the murder. *See Alston v. State*, 723 So. 2d 148, 162 (Fla. 1998) (defendant could have stopped at kidnapping and robbery, but instead confined victim and forced him to contemplate death while defendant decided what to do); *Jackson,* 704 So. 2d at 505; *Lynch v. State*, 841 So. 2d 362, 372 -73 (Fla. 2003) (defendant waited "thirty to forty minutes" for the victim to arrive home, shot victim and then dragged her into the apartment, had five to seven minutes in which he could have left the scene and not inflicted the final harm). As this Court stated in *Reynolds v. State*, 934 So. 2d 1128, 1156 (Fla. 2006):

> the victim who was attacked second must have experienced extreme anguish at witnessing [the other] being brutally stabbed and in contemplating and attempting to escape her inevitable fate." *Francis v. State*, 808 So. 2d 110, 135 (Fla. 2001).

Finally, Aguirre executed a strategically-placed blow to Bareis chest, severing the heart. This blow was obviously intended to kill the wheelchair-bound victim. The trial judge did not abuse his discretion in instructing on CCP.

Error, if any, was harmless. *See Jennings v. State*, 782 So. 2d 853, 863 n.9 (Fla. 2001)(if this Court strikes an aggravating factor the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence). This case involves a double homicide committed on two unarmed female victims in their own residence. Bareis, a stroke victim, was confined to her wheelchair and watched her daughter be brutally murdered. There

were six aggravating circumstances as to Bareis: prior violent felony (contemporaneous murder of Williams), during a burglary, committed to eliminate a witness, heinous/atrocious/cruel, vulnerable victim, and CCP.

POINT VII

THE TRIAL COURT PROPERLY FOUND THE MURDER OF CAROL BAREIS WAS COMMITTED TO ELIMINATE HER AS A WITNESS

This claim is the flip side of Point VI herein. Aguirre argues that the trial judge erred in finding the aggravating circumstance of avoid arrest/eliminate witness because the jury was not instructed on this aggravator. (Initial Brief at 60).[29]

Aguirre acknowledges *Williams v. State*, 967 So. 2d 735, 751 (Fla. 2007), in which this Court held:

> Finally, with regard to the trial court finding the CCP aggravator to exist and apply when this aggravator was not advanced by the State, we conclude that the trial court's action was not improper in the

[29] The State also contends this issue was not property preserved at the trial level. There was no objection at sentencing when the trial judge included this aggravator in his order. (V18, R875-879). The State argued the avoid arrest/eliminate witness aggravator at the *Spencer* hearing (V18, R780). The argument made by defense counsel was that the aggravator was not presented to the jury and that there was insufficient evidence to find avoid arrest. (V18, R782-84). However, he never clearly and specifically objected on the bases now raised. Further, the State addressed the issue in its Sentencing Memorandum (V3, R372, 383-85), but the defense did not address it in either its Sentencing Memorandum (V2, R350-370) or at sentencing.

abstract.[14] This Court has held that "it is not error for a judge to consider and find an aggravator that was not presented to or found by the jury." *Davis v. State*, 703 So. 2d 1055, 1061 (Fla. 1997), *cert. denied*, 524 U.S. 930, 118 S. Ct. 2327, 141 L. Ed. 2d 701 (1998). In support of this holding, we concluded that "[t]he trial judge ... is not limited in sentencing to consideration of only that material put before the jury, is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence." Id. (*quoting Engle v. State*, 438 So. 2d 803, 813 (Fla. 1983)). In *Hoffman v. State*, 474 So. 2d 1178 (Fla. 1985), this Court, in reaching a similar decision, stated, "We fail to see how the jury's not being instructed on this aggravating circumstance has worked to appellant's disadvantage ...." *Id*. at 1182.[15]

[14] In reaching this conclusion, we do not here address whether the trial court's finding of the CCP aggravator was supported by competent, substantial evidence. That issue will be addressed in the discussion of penalty phase challenges.

[15] Each of the aforementioned cases predates the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), requiring that the facts essential to the imposition of the punishment be found by a jury beyond a reasonable doubt. *See id*. at 589. Moreover, the jury had already recommended that Williams receive a sentence of death based upon the aggravators actually argued by the State, and in imposing a sentence of death, the trial court expressly stated that "[t]he imposition of the sentence in the present case is not contingent on the Court's finding the statutory aggravator of cold, calculating and premeditated." Accordingly, unless we were to strike all three of the other aggravators that were submitted to the jury and found by the trial court, the finding of the additional CCP aggravator would have no legal impact on the jury's advisory sentence or the trial court's ultimate recommendation.

Aguirre relies on the dissent in *Williams* as support for his argument that, after *Ring*, the trial judge cannot find an aggravator that was not presented to the jury. It is axiomatic that a dissenting opinion is not precedent. Aguirre's argument is

based on a mischaracterization of Florida capital sentencing law which clearly holds that death eligibility is established by the conviction of a capital offense. *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001).

In any event, the aggravators of prior violent felony and during the course of a burglary remove this case from any application of *Ring*.

The trial court held:

> **<u>The capital felony was committed for the purpose of avoiding or preventing a lawful arrest</u>.**
>
> This aggravating circumstance was not presented to the jury because the Court was of the impression that there was insufficient evidence to justify having the jury consider it. The State urged the Court to reconsider the existence of this aggravating circumstance at the *Spencer* hearing. Such practice is constitutionally suspect under the decision *of Ring v. Arizona,* 536 U. S. 584 (2002). However, it is part of the Florida death penalty scheme established by the Supreme Court of Florida, and the Court will consider the evidence that may establish it.
>
> The "avoid arrest" aggravator is difficult to prove. Where the victim is not a police officer, the evidence supporting this aggravator must prove that the sole or dominant motive for the killing was to eliminate the witness. *Zack v. State,* 753 So. 2d 9 (Fla. 2000); *Urbin v. State,* 714 So. 2d 411 (Fla. 1998); *Consalvo v. State,* 697 So. 2d 805, 819 (Fla. 1996) (speculation not enough); *Preston v. State*, 607 So. 2d 404 (Fla. 1992) (the fact that it may have been one of the motives is not enough.); *Davis v. State,* 604 So. 2d 794 (Fla. 1992); *Connor v. State,* 803 So. 2d 598 (Fla. 2001). Mere speculation on the part of the State that witness elimination was the dominant motive cannot support this aggravator. *Connor v. State, supra.* However, this aggravator may be established through circumstantial evidence for which the motive for the murder can be inferred. The fact that the victim and the Defendant knew each other, without more, is generally insufficient. However, evidence that the Defendant used gloves, wore a mask, made

> incriminating statements about witness elimination, whether the victim resisted, and whether the victim was confined or was in a position to pose a threat to the Defendant are factors that may be considered. *See, Renolds v. State,* — So. 2d —, 2006 WL 1381880 (Fla. May 18, 2006); *Buzia v. State,* 926 So. 2d 1203 (Fla. 2006).
>
> In this case, direct evidence of motive is lacking. The circumstances of the killings lead the Court to independently find that whatever motive the Defendant had to stab Cheryl Williams to death in such a brutal manner did not transfer to Carol Bareis. That being the case, the only motive for her murder was to eliminate her as a witness. The Defendant had no other reason to kill her. She was partially paralyzed and in a wheel chair, thereby posing no threat to him.
>
> The Court independently finds this aggravating circumstance has been proven beyond a reasonable doubt and assigns great weight to it.

(V3, R421-423).

The standard of review for a trial court's ruling on an aggravating factor is whether competent, substantial evidence supports the trial court's finding. *Conde v. State*, 860 So. 2d at 953. This case is similar to both *Willacy v. State*, 696 So. 2d 693 (Fla. 1997), and *Buzia v. State*, 926 So. 2d 1203 (Fla. 2006). In *Willacy,* the defendant bludgeoned the victim and tied her hands and feet together. Because the victim no longer posed an immediate threat to him, and because she was his next-door neighbor and could identify him easily, this Court concluded that he had little reason to kill her except to eliminate her as a witness. In *Buzia,* the defendant easily subdued his victim, an elderly man who was injured and bleeding badly. The victim no longer posed an immediate threat to Buzia and was incapable of thwarting Buzia's purpose, escaping, or summoning help. There was little reason

for Buzia to hit the victim with an ax, except to kill him so Buzia could avoid arrest. *Buzia*, 926 So. 2d at 121

Error, if any, was harmless. *See Jennings v. State*, 782 So. 2d 853, 863 n.9 (Fla. 2001)(if this Court strikes an aggravating factor the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence). This case involves a double homicide committed on two unarmed female victims in their own residence. Bareis, a stroke victim, was confined to her wheelchair and watched her daughter be brutally murdered. There were six aggravating circumstances as to Bareis: prior violent felony (contemporaneous murder of Williams), during a burglary, committed to eliminate a witness, heinous/atrocious/cruel, vulnerable victim, and CCP.

POINT VIII

THE TRIAL COURT PROPERLY FOUND THE MURDER OF CAROL BAREIS WAS HEINOUS, ATROCIOUS, OR CRUEL

On pages 70-73 of his brief, Aguirre claims the murder of Bareis was not heinous, atrocious, or cruel ("HAC"). The trial court found:

> The Court independently finds that the evidence established the murder of Cheryl Williams occurred first. Carol Bareis was wheel chair bound in the room next to, and in close proximity with, the entrance way where Williams was murdered. She must have been aware of the violence and brutality directed towards her daughter. The incident must have terrified her. The Defendant then came at her with the same knife he used to murder Williams and plunged it into her

> heart. The fear, emotional strain, and terror she suffered prior to the fatal blow are sufficient for the Court to find the murder of Carol Bareis was heinous, atrocious or cruel. *Lynch v. State,* 841 So. 2d 362 (Fla. 2003). The Court assigns great weight to this aggravating circumstance.

(V3, R423). The standard of review for a trial court's ruling on an aggravating factor is whether competent, substantial evidence supports the trial court's finding. *See Williams v. State*, 967 So. 2d 735, 764 (Fla. 2007). These findings are supported by the evidence. Dr. Beaver opined that Bareis was murdered second based on the evidence. Bareis had no defects in hearing or seeing and would have been acutely aware of the violent struggle between Williams and Aguirre. Moreover, Bareis was helpless to do anything because she was confined to a wheelchair.

This Court has held that when the victim is acutely aware of her impending death, even where the victim was conscious for merely seconds, the HAC aggravator applies. *See Rolling v. State*, 695 So. 2d 278, 296 (Fla. 1997); *Buzia v. State*, 926 So. 2d 1203, 1214 (Fla. 2006). Bareis' daughter, Williams, was stabbed 129 times in front of her, tried to crawl to the door, and was stabbed in the back.

Although not raised by Aguirre, this Court reviews death sentences for proportionality. Rule 9.142(6), Fla.R.App.P.

As to Williams, the trial judge found three aggravating circumstances. He gave great weight to HAC,[30] one of the weightiest aggravators (V3, R420), "more than moderate, but less than great weight" to the during-a-burglary aggravator (V3, R419) and moderate weight to the contemporaneous murder (V3, R418). As to the murder of Bareis, the trial judge found five aggravators. He gave great weight to the HAC, avoid arrest, contemporaneous murder, and vulnerable victim aggravators (V3, 420-21). He gave "more than moderate, but less than great weight" to the during-a-burglary aggravator. (V3, R421).

As to both victims, the trial judge gave moderate weight to the statutory mitigating circumstances of extreme emotional disturbance and substantially impaired; and to the non-statutory mitigators of long-term substance abuse and brain damage from polysubstances. He gave little weight to the age of the Defendant at the time of the murders, dysfunctional family setting, physical abuse as a child, and poor performance in later years of schooling. (V3, R430-31).

This case is proportionate to other death sentenced defendants. *See Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006)(four aggravating circumstances-prior violent felony, avoid-arrest, HAC, and CCP); *Reynolds v. State*, 934 So. 2d 1128 (Fla. 2006)(four aggravating circumstances - prior violent felony, during a burglary, avoid-arrest, HAC). This Court has upheld death sentences where the

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[30] The HAC aggravator is one of the most serious aggravators set out in the statutory sentencing scheme. *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999).

prior violent felony aggravator was the only one present. *See, e.g., Rodgers v. State,* 948 So. 2d 655 (Fla. 2006); *LaMarca v. State*, 785 So. 2d 1209, 1217 (Fla. 2001); *Ferrell v. State*, 680 So. 2d 390, 391 (Fla. 1996).

POINTS IX, X and XI

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Aguirre challenges Florida's death penalty on three bases: (1) imposing death with a 7-5 jury recommendation; (2) burden of proof on aggravating/mitigating circumstances; and (3) *Ring v. Arizona,* 536 U.S. 584 (2002). These challenges have repeatedly been rejected by this Court.

1. Jury recommendation. Aside from generalities, Aguirre cites no precedent holding that a specific threshold number or proportion of jurors is required to recommend a death sentence. This argument is an extension of the non-unanimous jury recommendation that this Court has repeatedly rejected. *See Franklin v. State*, 965 So. 2d 79, 101 (Fla. 2007); *Cole v. State*, 841 So. 2d 409, 429 (Fla. 2003); *Bottoson v. Moore*, 833 So. 2d 693 (2002).

2. Burden of proof . This claim, in one version or another, has been consistently rejected by this Court. *See Reynolds v. State*, 934 So. 2d 1128, 1151 (Fla. 2006); *Asay v. Moore*, 828 So. 2d 985 (Fla. 2002); *Carroll v. State*, 815 So. 2d 601 (Fla. 2002); *Rutherford v. Moore*, 774 So. 2d at 637 (Fla. 2000); *San*

Martin v. State, 705 So. 2d 1337 (Fla. 1997); *Shellito v. State*, 701 So. 2d 837 (Fla. 1997); *Arango v. State*, 411 So. 2d 172 (Fla. 1982).

3. *Ring*. Also repeatedly rejected. *See Walker v. State*, 957 So. 2d 560, 576 (Fla. 2007); *Troy v. State*, 948 So. 2d 635, 653 (Fla. 2006)(*Ring* does not apply to the facts of this case because the "course of a felony" aggravator based on the conviction for burglary, resting on a unanimous guilt-phase verdict, is present). Moreover, Aguirre was convicted of contemporaneous murders, each of which the jury found unanimously. *See Overton v. State,* 976 So. 2d 536 (2007); *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003).

CONCLUSION

Based on the foregoing authorities and arguments, Appellee respectfully requests this Honorable Court affirm the convictions and sentences.

Respectfully submitted,

BILL McCOLLUM
Attorney General

____
BARBARA C. DAVIS
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Seabreeze Blvd, 5th Floor
Daytona Beach, FL 32118
(386) 238-4990
Fax - (386) 226-0457

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished to Chris Quarles, Office of the Public Defender, 444 Seabreeze Blvd., Daytona Beach, FL 32118, by hand delivery, this _____ day of April, 2008.

____
BARBARA C. DAVIS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Answer Brief of the Appellee was generated in a Times New Roman, 14 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

____
BARBARA C. DAVIS
Attorney for Appellee